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90-303

No. _____

In The

Supreme Court of the United States

October Term, 1990

LE BUP THI DAO, et al.,

Petitioner,

v.

BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

ROBERT FELLMETH
Center for Public Interest Law
UNIVERSITY OF SAN DIEGO
Alcala Park
San Diego, CA 92110
(619) 260-4806
Counsel of Record

CARL K. OSHIRO
JULIE D'ANGELO
Center for Public Interest Law
1160 Battery Street
Suite 340
San Francisco, CA 94111
(415) 544-8832
Counsel for Petitioners

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QUESTIONS PRESENTED

1. Whether States and their agencies may be sued for damages under the Civil Rights Act of 1866, 42 U.S.C. section 1981?

2. Whether state officials sued in their individual capacities under the Civil Rights Act of 1871, 42 U.S.C. section 1983 for engaging in deliberate and unlawful discrimination, are immune from damages for all actions in their official capacities?

3. Whether declarations by individual defendants asserting that they acted in good faith and without discriminatory intent are sufficient to sustain a motion for summary judgment on the grounds of qualified immunity?

LIST OF PARTIES

The parties to the proceedings below were petitioners Dr. Le Bup Thi Dao, Dr. Tao Nguyen, Dr. Richard Le, and Dr. Sang Van Tran and respondents Board of Medical Quality Assurance of the State of California, Division of Licensing of the Board of Medical Quality Assurance, Credentials Committee of the Division of Licensing, Department of Consumer Affairs of the State of California, Kenneth Wagstaff, Dr. Galal Gough, Dr. Lindy Kumagai, Dr. John Lungren, Dr. James Magnall, Raymond Mallel, Audrey Melikian, Dr. J. Alfred Rider, and Dr. Jerome Unatin. The Committee for the Rights of Refugee Physicians in the United States was also a petitioner and real party in interest in the court below on the issues of declaratory and injunctive relief. Since the issues are not addressed in this petition, the Committee is not named as a party herein.

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BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dr. Le Bup Thi Dao, Dr. Tao Trung Nguyen, Dr. Sang Van Tran, and Dr. Loc Phuoc Le, the petitioners herein pray that a writ of certiorari issue to review the opinion issued by the Court of Appeal of the State of California, First Appellate District, in the above-entitled case on February 26, 1990.

OPINIONS BELOW

The opinion of the Court of Appeal for the First Appellate District of the State of California is unreported and reprinted as Appendix I, p. App. 1. The initial opinion of the Court of Appeal for the First Appellate District is unreported and reprinted as Appendix II, p. App. 15. The order of the Superior Court of the City and County of San Francisco is unreported and reprinted as Appendix III, p. App. 32.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. sections 1981 and 1983, plaintiffs brought this action in the Superior Court of the City and County of San Francisco. On May 19, 1989, the Superior Court partially granted defendants motion for summary judgment holding that (1) the institutional defendants were subject to suit under 42 U.S.C. section 1981 and (2) the individual defendants were immune from suit by virtue of qualified immunity. (Appendix III, p. App. 32.) Both sides sought review by filing writs with the California Supreme Court. Review was granted and transferred to the Court of Appeal for the First Appellate District for alternative writs and hearing.

On January 5, 1990, the Court of Appeal issued its initial decision on the writs. The Court held that: (1) the institutional defendants could not be sued under either 42 U.S.C. sections 1981 or 1983 and (2) because of the "wealth of conflicting evidence" in the case, the individual defendants were not entitled to summary judgment

based on qualified immunity. (Appendix II, pp. App. 20-26.) Both sides petitioned for rehearing. The Court of Appeal denied both petitions, but granted rehearing on its own motion and treated the matter as submitted.

On February 26, 1990, the Court of Appeal issued its second opinion which is the subject of this petition. Relying on two decisions by this Court decided last term, the Court of Appeal disposed of petitioners' claims for damages against institutional and individual defendants as follows: (1) relying on *Jett v. Dallas Independent School District*, ___ U.S. ___ [109 S.Ct. 2702] (1989), the Court held that state agencies could not be sued for damages under either section 1981 or section 1983 and (2) relying on *Will v. Michigan Department of State Police*, ___ U.S. ___ [109 S.Ct 2304] (1989), the Court held that the individual defendants were absolutely immune from damages, since they were acting at all times in their official capacities. (Appendix I, pp. App. 6-9.)

A timely petition for review was denied by the California Supreme Court on May 17, 1990. On July 12, 1990, the Court of Appeal issued a Peremptory Writ of Mandate ordering the trial court to vacate its previous order and enter a new order in conformity with its opinion. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a).

STATUTES INVOLVED

42 U.S.C. Section 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and

Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Section 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a civil rights action brought under 42 U.S.C sections 1981 and 1983 challenging the refusal of the Board of Medical Quality Assurance of the State of California and others to license Vietnamese physicians from 1986 to 1988. The petitioners are four graduates from the internationally recognized University of Saigon Medical

School. That school was the product of a unique experiment in international cooperation, run under the tutelage of American medical scholars and the aegis of the American Medical Association.

Petitioners each graduated from the medical school after the fall of Vietnam. They practiced for a short time in Vietnam before fleeing the country as refugees. In the United States, they each repeated their medical education as required by California law. They passed the required national examinations for English proficiency, basic scientific training and background, and for medical skill and training. After a thorough review of their credentials, each received permission from the State to enter post graduate training programs as interns and residents in hospitals.

Beginning in 1984, the Board of Medical Quality Assurance (the state agency which licenses physicians in California) began an investigation into Vietnamese doctors who left Vietnam prior to the fall of Saigon. That investigation uncovered no evidence of wrongdoing and no action was ever taken. However, using that investigation as a pretext, the Board abruptly suspended all further licensing of Vietnamese doctors as a class in early 1986.

On January 30, 1986, despite sending petitioners Le Dao and Tao Nguyen letters stating that they had passed all exams and training and had completed all of the requirements for licensure, the Board in closed session decided to suspend the licensing of all Vietnamese doctors regardless of training, skill, or any individual factors. In mid-1986, the Board began applying new standards to

petitioners as post-1975 graduates, based ostensibly on concerns about petitioners' documents and training.

Respondents have since conceded that their suspicions abut petitioners' documents and training were without foundation, and no investigation has ever established any fraud, impropriety, training gap or deficiency, or other basis for disqualifying *bona fide* Vietnamese graduates of an internationally recognized medical school. Indeed respondents finally licensed petitioners (and some thirty other post-1975 Vietnamese graduates) in 1988, pursuant to a special licensing and certification process established by the State Legislature over respondents' vehement opposition.

However, from 1986 to 1988, petitioners' lives were derailed by respondents' refusal to license Vietnamese physicians. As a consequence, they lost both job and training opportunities which they were offered and for which they were clearly qualified. The facts concerning the lead petitioner, Dr. Dao, are illustrative of the dilemma faced by petitioners during this period.

Dr. Dao was born and raised in the Republic of Vietnam, (commonly known as South Vietnam) as the eldest of nine children. In 1971, she was among 200 of 5,000 applicants selected to enter the University of Saigon Medical School. She completed her coursework in 1975 and residency in 1976 and 1977. Dr. Dao graduated in 1977, after which she practiced medicine at Cho Ray Hospital in Vietnam.

In March 1978, Dr. Dao fled Vietnam, leaving her family behind, as a refugee in a boat in open ocean. She eventually settled in Orange County, California where

she became fluent in English and became an American citizen in 1985. She also set out to fulfill all of the requirements for medical licensure in California. See, California Bus. & Prof. Code Sections 2100 *et seq.* In 1981, she passed the examination of the Educational Commission for Foreign Medical School Graduates. In 1982, she passed the national medical licensing FLEX examination. In 1984, she successfully completed a one-year internship at the University of California Irvine Medical Center, and in 1986, successfully completed a two-year residency there. In January 1986, Dr. Dao passed the oral examination for medical licensure in California.

On February 4, 1986, Dr. Dao received a letter from the Board of Medical Quality Assurance informing her that the only remaining requirements for issuance of her medical license were payment of $200 and a recent photograph. She promptly sent both to the Board, but did not receive her license. Instead, in response to her inquiries, she was told informally that the Board has suspended all licensing of Vietnamese physicians.

The Board's action forced Dr. Dao to withdraw from an offer to work as a physician at the Orange County Children's Hospital. At the time this action was filed, Dr. Dao was reduced to working as a lab technician, a position far below her training and qualifications as a physician.

From 1986 to 1988, petitioners' efforts to address the Board's concerns were both frustrating and unsuccessful. The evidence shows that, during this period, respondents were suspicious of all Vietnamese physicians. Respondents' suspicions were based on the belief that Vietnamese physicians should not be licensed because either

they were "communists" or, for some unknown reason, Vietnamese doctors were incompetent to practice medicine in California. These suspicions were without any factual foundation.[1]

For example, respondent Galal Gough, who served as the President of the Board, told a California State Senator that Vietnamese medical graduates "were trained by communists" and therefore their training "cannot be trusted."[2] During this period, respondent Gough repeatedly cited to an anonymous letter alleging that students at the University of Saigon Medical School were affiliated with the Communist Party.[3] He also expressed strong

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[1] For petitioners, the suggestion that they were "communists" or "members of the Communist Party" was a particularly bitter charge since their opposition to communism caused them to flee their country, where, in some cases, family members were imprisoned by the communist government. For example, after the fall of Saigon, Dr. Dao's father was placed in a prison camp.

[2] See, Declaration of Senator Royce at p. 2 in the record of this proceeding where the Senator states:

> "During a recess in the hearing, a person, who I later learned was Dr. Galal Gough, approached me and spoke with me regarding the post-1975 Vietnamese medical graduates. He told me the post-1975 Vietnamese medical graduates were "trained by communists" and that their training therefore "cannot be trusted.""

Dr. Gough's version of the same conversation is "I said we received information that stated that all applicants who were admitted to the universities after 1975 had to be a member of the Communist Party." Gough Deposition at p. 96.

[3] See, Minutes of BMQA, Division of Licensing Meeting of November 13-14, 1986 at p. 16; Gough Deposition at pp. 88-92.

doubts concerning the competency of Vietnamese doctors based on a single allegation that an unnamed Asian doctor from an unidentified medical school and country had difficulty with a medical procedure during training.[4]

Sentiments like these caused respondents to suspend the licensing of all Vietnamese physicians in 1986 and to continue that suspension even when there was no evidence to sustain it. Faced with the question from the head of the staff whether Vietnamese doctors would be licensed if an investigation cleared every credentials and training question, respondent J. Alfred Rider, who was then the President of the Division of Licensing answered "NO", and the matter was dropped without dissent from the other members.[5]

The evidence also shows that, during this same period, members of the Board were taking extraordinary steps to grant favorable treatment to license non-Vietnamese friends and acquaintances. For instance, Licensing Division President Rider repeatedly pressed the division to license a graduate from Guadalahara who was performing work in his office. The applicant had

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[4] *Id.* Gough Deposition at p. 93. That respondent Gough was deeply suspicious of all Vietnamese doctors was known to staff members. For example Mark Grimm, who was the chief staff person for the Vietnamese matter, describes Dr. Gough as being "very suspicious" of Vietnamese doctors. Grimm Deposition at pp. 133 and 261. Mr. Grimm attributes that suspicion to respondent's general suspicion of "Communist regimes" combined with Dr. Gough's "unusual experience" as a Marine Corps doctor in the Vietnam War some 20 years before. Grimm Deposition pp. 132-133 and 261.

[5] Grimm Deposition at pp. 294-295.

deficiencies in his training, his documentation, and his clinical rotations.[6] Throughout 1986 and 1987, respondent Rider pressed for the applicant's licensure, despite warnings from the Attorney General and his staff's assessment that the applicant was "totally unqualified to be licensed."[7] Over the staff's objections, the applicant was eventually granted a license.

Similarly, Board President Gough held a private meeting with an Iranian refugee who had documentation problems and was one of the few persons to fail the oral examination. Respondent Gough ordered the staff to admit the applicant to the next exam, even though he was not eligible. Dr. Gough then personally appeared at the exam site unannounced, pulled the applicant out of line, told the staff he was giving the exam himself, took the applicant into a room without the required second

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[6] In his sworn declaration Mark Grimm describes the applicant as follows: "One of the bottom ten percent of the class types. Doesn't have a Fifth Pathway. Doesn't have a real residency." Grimm Declaration at p. 139. He is "missing documents; he's missing components of his education." *Id.* at 146. "Totally unqualified to be licensed in this state. . . . " *Id.* at 139. Mr. Grimm also states "Vietnamese who were being held up for licensure are without question more qualified than [applicant]. You just can't deny that fact." Grimm Deposition at p. 271.

[7] See, Grimm Deposition at pp. 140-146, 266, 270-273, 278 and 473.

proctor, and reemerged minutes later to pronounce the applicant as passed and eligible for licensure.[8]

While respondents gave favored treatment to non-Vietnamese applicants they continued to refuse to license petitioners and other qualified Vietnamese physicians. Indeed, at a December 1986 meeting, where Dr. Rider stated that he would not license the Vietnamese doctors even if an investigation dispelled all concerns, the application of the Guadalahara graduate was again considered at Dr. Rider's request.[9]

Finally, in 1988, pursuant to reforms enacted by the California Legislature, a panel of experts reviewed the

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[8] Mr. Grimm states:

> "[The staff was] there to complain about what had happened at the exam and what had happened is that the Iranian was in a queue of 20 people to be randomly assigned to the next available Commissioner, and Dr. Gough showed up at the exam, saw the individual standing in the queue, went over and got him, brought him back to the counter where they do the scheduling and so forth, and advised the staff that this individual would not be taking the regular exam, that he would be doing the examination himself personally, and they went off down the hall to a room somewhere, and about 20 minutes came back and as he walked by Dr. Gough said, 'he passed.' "

Mr. Wheaton: "This is what your staff related?"

Mr. Grimm:

> "This is what they related to me. . . . This shouldn't have happened, and it was wrong."

Grimm Deposition at p. 265-266. The Attorney General's office called the action "totally inappropriate" and the exam results "invalid", but to no avail. *Id.* at 266.

[9] Grimm Deposition at p. 274.

curriculum for the University of Saigon Medical School and found that it met all of the requirements for licensure in California. The expert panel then reviewed the credentials for each Vietnamese applicant to determine whether they had attended the school, passed all exams and graduated.

Dr. Dao was among the first to be reviewed by the panel which found that she met all requirements for medical licensure in California. She received her license in March 1988 over two years after first being told by the Board that she had passed all exams and needed only to send in $200 and a recent photo.

Petitioners brought this action in Superior Court of the County of San Francisco in May 1987 against the Board of Medical Quality Assurance, its Division of Licensing, its Credentials Committee and the Department of Consumer Affairs. Also named as defendants were certain members and staff of the Board (including respondents Gough and Rider) each of whom were sued in their individual and official capacities.

Discovery was conducted in 1988 and 1989 and the matter was set for trial on March 20, 1989. After the trial was continued because of lack of a courtroom, defendants moved for summary judgment. On May 19, 1989, the court partially granted defendants motion for summary judgment holding that (1) the institutional defendants were subject to suit under 42 U.S.C. section 1981 and (2) the individual defendants were immune from suit by virtue of qualified immunity. (Appendix III, p. App. 32.) Both sides sought review by filing writs with the California Supreme Court. Review was granted and transferred

to the Court of Appeal for the First Appellate District for alternative writs and hearing.

On January 5, 1990, the Court of Appeal issued its initial decision on the writs. The Court held that: (1) the institutional defendants could not be sued for damages under either 42 U.S.C. section 1981 or section 1983 and (2) because of the "wealth of conflicting evidence" in the case, the individual defendants were not entitled to summary judgment based on qualified immunity. (Appendix II, pp. App. 20-26.) Both sides petitioned for rehearing. The Court of Appeal denied both petitions, but granted rehearing on its own motion and treated the matter as submitted.

On February 26, 1990, the Court of Appeal issued its second opinion which is the subject of this petition. Relying on two decisions by this Court decided last term, the Court of Appeal disposed of plaintiffs' claims for damages against institutional and individual defendants as follows: (1) relying on *Jett v. Dallas Independent School District*, ___ U.S. ___ [109 S.Ct. 2702] (1989) the Court held that state agencies could not be sued for damages under either section 1981 or section 1983 and (2) relying on *Will v. Michigan Department of State Police*, ___ U.S. ___ [109 S.Ct. 2304] (1989) the Court held that the individual defendants were absolutely immune from damages, since they were acting at all times in their official capacities. (Appendix I, pp. App. 6-9.) Reviewing the evidence the Court stated "Defendants submitted considerable, uncontradicted, evidence in support of their claim that an undisputed material fact was that the 'Individual defendants . . . were at all times material to this matter state officials acting in their official capacity under color of state law.' " *Id.*

A timely petition for review was denied by the California Supreme Court on May 17, 1990. On July 12, 1990, the Court of Appeal issued a Peremptory Writ of Mandate ordering the trial court to vacate its previous order and enter a new order in conformity with its opinion.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Determine Whether the State Court Properly Interpreted and Applied *Jett v. Dallas Independent School District* ___ U.S. ___ [109 S.Ct. 2702] (1989).

The Court of Appeal held that *Jett v. Dallas Independent School District*, ___ U.S. ___ [109 S.Ct. 2702] (1989) precludes any action for damages against a state or its agencies under 42 U.S.C. section 1981. In so doing, the state court went far beyond this Court's holding in *Jett*.

In *Jett*, this Court addressed whether section 1981 provides an independent federal cause of action for damages against *local* governmental entities. The Court held that there was no cause of action under that section. Important to the Court's decision was the fact that local governments could be sued for damages under section 1983.

Writing for the plurality, Justice O'Connor makes clear that where Congress has not acted to establish an alternative "remedial scheme" under section 1983, courts are compelled to find a cause of action for damages under section 1981. Concerning actions against private defendants where the Court has implied a damages remedy, Justice O'Connor states:

> In the context of the application of Section 1981 and Section 1982 to private actors, we "had little choice but to hold that aggrieved individuals could enforce this prohibition *for there existed no other remedy to address such violations of the statute.*"

109 S.Ct. 2270 (citations omitted, emphasis original).[10]

The Court of Appeal ignored this important limit to *Jett*. Instead, the state court extended *Jett* to bar damage actions against state entities under section 1981 even when no relief is available against state entities under section 1983. See, *Will v. Michigan Dept. of State Police*, ___ U.S. ___ [109 S.Ct. 2304] (1989) (State is not a "person" subject to suit under section 1983.). The Court of Appeal states:

> Plaintiffs invoked section 1981 solely in connection with one of their claims for damages alleged in their complaint. Less than a year ago the United States Supreme Court held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." (*Jett v. Dallas Independent School Dist.*, (1989) ___ U.S. ___ (109 S.Ct. 2702, 2721-2722.) A further difficulty is that section 1983 does not apply to claims against a State. (*Will v. Michigan Dept. of State Police, supra*, at p. ___ [109 S.Ct. 2304 at pp. 2307-2308, 2312];

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[10] The dissenting opinion observes "The Court's *primary reason* for distinguishing between private and governmental conduct under § 1981 appears to be its impression that, because private conduct is not actionable under § 1983, we had "little choice" but to hold that private individuals who violated § 1981 could be sued directly under § 1981." 109 S.Ct. at 2730 (emphasis added).

see *Pyne v. Meese*, (1985) 172 Cal.App.3d 292, 401-403.)

Appendix I at p. App. 7. Contrary to *Jett*, the state court has precluded petitioners from seeking damages under *both sections 1983 and 1981*. This overexpansive reading of *Jett* bars petitioners and other persons who are injured by state deprivation of their civil and constitutional rights from obtaining damages under both civil rights statutes.

This Court has long recognized that damages in civil rights actions are "a vital component . . . for vindicating cherished constitutional guarantees." *Owen v. City of Independence* 445 U.S. 622, 651, *reh'g denied*, 446 U.S. 993 (1980). Damage awards are "intended not only to provide compensation to the victims of past abuses, but [also] to serve as a deterrent against future constitutional deprivation as well." *Id.*

This Court has specifically recognized that damages are of particular importance when the government acts to deprive persons of their civil rights. As the Court explained in *Owen*,

> How uniquely amiss it would be, therefore, if the government itself – "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" – were permitted to disavow liability for the injury it has begotten. A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it had transgressed.

445 U.S. at 651 (citations omitted). Concerning the deterrent effect of damage awards for civil rights violations, this Court stated

> The knowledge that a municipality will be liable for its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials each of whom may be acting in good faith.

445 U.S. at 651-652.

These principles are fully applicable to this case. Petitioners came to the United States because they believed that (unlike the regime they were fleeing) our government promoted liberty, justice, and fair and equal treatment under the law. Instead of protecting these rights, the state agency regulating the practice of medicine in California considered petitioners and all doctors who fled Vietnam "communists", untrustworthy, and incompetent. For over two years, the Board of Medical Quality Assurance blocked the licensing of all Vietnamese trained doctors based on prejudice, rumor, and personal suspicion.

During this period, petitioners suffered the types of injuries that are clearly compensable in civil rights

cases.[11] Because of the Board's refusal to license Vietnamese doctors, petitioners were forced to give up jobs, internships, and other positions which they were offered and for which they were unquestionably qualified.

If the Court of Appeal's decision is allowed to stand, the State of California would be free to disavow liability for the injuries it has caused. While injunctive relief is still available under section 1981, an injunction would do little more than order the offending agencies to "Go and sin no more." Under those circumstances, state officials would have little incentive to detect, investigate, curb or prevent racially discriminatory action aimed against minority groups.

The Court should grant certiorari in this case to clarify its holding in *Jett*. While a close reading of that decision reveals that courts must find a cause of action for damages under section 1981 where no alternative remedy exists under section 1983, it is apparent that lower courts are erroneously interpreting the plurality's use of the term "state governmental units" to bar damage suits against the state agencies as well as local governmental agencies. Decisions like those of the Court of Appeal foreclose any damage remedy against the state under both section 1981 and section 1983. This is well beyond the holding in *Jett* and contrary to the Court's reasoning in that decision.

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[11] In addition to monetary losses, courts now hold that victims of racial discrimination can recover damages for emotional distress. See e.g., *Flanagan v. Aaron E. Henry Community Center*, 876 F.2d 1231 (5th Cir. 1989).

II.

The Court Should Grant Certiorari to Clarify the Use of Qualified Immunity after *Will v. Michigan Dept. of State Police*, ___ U.S. ___ [109 S.Ct. 2304] (1989).

As a second, independent issue, the Court of Appeal erred in failing to apply the qualified immunity doctrine to the respondents sued in their individual capacity. In two brief paragraphs, the Court of Appeal held that the qualified immunity doctrine no longer applies to state officials after *Will*.

A. The Court of Appeal's interpretation of *Will* is Wrong as a Matter of Law.

Over the last decade, the United States Supreme Court has carefully constructed an analytical framework for determining when public officials may be sued in their individual capacities for their conduct in office that transgresses statutory or constitutional boundaries. The mode of analysis has been summarized as follows:

> Some officials, such as judges, prosecutors, and legislators are generally protected by absolute immunity, while most administrative and executive officials are protected by a qualified good faith immunity. The absolute immunity "bars a suit at the outset and frees the defendant official of any obligation to justify his action," while qualified immunity is in the nature of an affirmative defense and protects an official from liability only if he can show that his actions did not contravene clearly established statutory or constitutional rights of which a reasonable person in his position would have known.

Schwartz and Kirkin, *Section 1983 Litigation: Claims, Defenses, and Fees*, § 7.2, p. 143.

The principal cases concerning qualified immunity are *Anderson v. Creighton*, ___ U.S. ___ [107 S.Ct. 3034] (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) [102 S.Ct. 2764]. These cases strike a careful balance between permitting individuals to vindicate their rights, while allowing summary judgment to permit public officials to avoid frivolous suits. *Anderson* and *Harlow* require that lower courts determine whether the actions of executive or administrative officials sued in their individual capacity "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson, supra*, ___ U.S. ___ 107 S.Ct. at 3038 "Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action turns on the "objective legal reasonableness" of the action." *Id.*

In this action, plaintiffs sued the individual defendants in their "individual and official capacities."[12] Relying on *Will*, the Court of Appeal discarded the entire qualified immunity doctrine carefully established by this Court. The Court of Appeal broadly construed *Will* to foreclose any action against state officials "acting in their official capacities." The court stated

> In their petition (A046132) plaintiffs ask us to overturn the determination by respondent court that the individual defendants enjoy immunity from plaintiffs' damage claims. To continue the theme developed in part I, that

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[12] See, Plaintiffs' Second Amended Complaint of Course, filed on August 26, 1987 p. 8 (emphasis added) ("The individual defendants who are members of the organizational defendants are as follows: . . . Each is sued in his or her *individual* and official capacities."

> determination has been vindicated by recent developments from the United States Supreme Court. Insofar as respondent court's determination found against plaintiffs on their claim based upon 42 U.S.C. section 1983, that ruling is invulnerable for a reason which could not be anticipated by either the court or the parties. In *Will v. Michigan Dept. of State Police, supra,* ___ U.S. ___ (109 S.Ct. 2304 at pp. 2311-2312), the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" and therefore cannot face liability for damages. Lesser federal courts have reached the same conclusion with respect to sections 1985 and 1986. (See *Coffin v. South Carolina Dept. of Social Services,* (D.S.C. 1983) 562 F.Supp. 579, 585-586 and authorities cited.)

Appendix I, at pp. App. 7-8.

This is a misreading of the holding in *Will.*

In *Will,* the defendant, Director of State Police was sued *only in his official capacity.*[13] Consequently, there was no reason for the Court to apply the qualified immunity doctrine established in *Harlow* and *Anderson.* The Court was merely asked to determine whether a state agency and its officials sued in their official capacity were "persons" under Section 1983. The Court held that they were not. The Court stated that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . [and as such,] it is no different from a suit against the State itself." 109 S.Ct. at 2311. Since it held that the latter is not permitted under section 1983, the Court further held that

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[13] "Named as defendants were the Department of State Police and the Director of State Police in *his official capacity,* also as a respondent here." 109 S.Ct. at 2306 (emphasis added).

an official-capacity suit against a state official under section 1983 is also not permitted. *Id.*

Unfortunately, in the last paragraph of its opinion, the Court stated

> We hold that neither a State nor its officials *acting* in their official capacities are "persons" under section 1983.

109 S.Ct. at 2312 (emphasis added). Despite the facts in *Will* limiting its holding to cases where state officials are sued in their official capacities, the Court of Appeal seized on the use of the word "acting" in the above sentence to extend an absolute immunity to state officials whether they are sued in their official capacity or not. Appendix I at pp. App. 7-8.

Nor is the Court of Appeal the only court finding the use of the word "acting" confusing. In *Kolb v. State of Ohio Dept. of Mental Ret. & Dev.*, 721 F.Supp. 885, 895 (N.D. Ohio 1989), the defendants similarly argued based on *Will* that "state officials sued in their individual capacities are still immune from suit as long as they were acting in their official capacities." There, the District Court held that the defendants were not entitled to such immunity. The court stated:

> The court finds that the Supreme Court did not intend to adopt the "ultra vires" theory advanced by the defendants. If such were the case, the Court would have effectively overruled several of its prior decisions and established a new and completely unqualified requirement for pleading section 1983 actions against state officials in their individual capacities. This is something the Supreme Court would not undertake lightly, and it is thus the opinion of this Court that the Supreme Court intended no such thing."

Id. at 897.

The District Court then went on to explain that the qualified immunity doctrine was applicable.

> Thus the defendants' argument quite simply misstates the law. State officials who commit constitutional torts cannot invoke the state's sovereign immunity as an absolute defense to a subsequent civil rights lawsuit against them. Otherwise, it would be virtually impossible to bring a section 1983 claim against a state actor in federal court. However, though they are not entitled to the absolute immunity of the Eleventh Amendment, certain state officials are entitled to qualified or good faith immunity.

Id. at 898. With regard to *Will*, the District court stated "The use of the word "acting" instead of the phrase "sued in" [in the last sentence of *Will*] *will certainly cause much confusion in future applications of this holding.*" *Id.* at 898 (emphasis added).

In the instant case, confusion over the meaning of *Will* caused the California Court of Appeal to dismiss petitioners' legitimate claims for damages against the individual respondents under section 1983. Similar confusion by lower courts (especially state courts which lack experience in civil rights cases) will cause other plaintiffs to be wrongly denied this remedy.

B. The Court of Appeal's Review of the Factual Record is Founded on its Erroneous Interpretation of *Will*.

Following its erroneous interpretation of *Will*, the Court of Appeal reviewed the record to determine whether the individual defendants "were acting in their official capacities." The Court stated

> Defendants submitted considerable, uncontradicted evidence in support of their claim that an undisputed material fact was that the *"Individual defendants . . . were at all times material to this matter state officials acting in their official capacities under color of State law."* Those defendants can therefore face no liability for monetary damages as to sections 1983, 1985, and 1986.

Appendix I, at p. App. 8 (emphasis added). In fact, under the qualified immunity doctrine, the issue before the Court should have been whether, in construing the facts in a manner most favorable to the plaintiffs, the individual defendants' knew or should have known that their refusal to license Vietnamese doctors violated clearly established law.

In this case, the motion for summary judgment was made by defendants' after extensive discovery by both sides. Consequently, there is an abundance of evidence concerning the actions of the individual respondents' and their motives therefore.

The basis for petitioners' claims is contained in a voluminous record, drawn from respondents' own depositions, documents of the Board, several sworn declarations and the deposition of the former head of the Board's licensing division who was disgusted with the Board's treatment of the applicants, and the sworn declaration of a State Senator who was told by a defendant why they were not going to license the Vietnamese. In brief, the record reveals:[14]

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[14] It is important to not that while plaintiffs have relied on the testimony of defendants and other parties in concert with them, and on defendants' documents revealed in discovery, to

(Continued on following page)

1. Respondents treated petitioners as a class of persons, defined solely by their status as Vietnamese, in denying them licenses and imposing unique licensing requirements upon them;

2. Respondents on three separate occasions in 1986 met in closed session, without legally required notice before or after the meeting, to discuss petitioners, and there decided to "suspend" licensing of petitioners, despite lacking any evidence of any impropriety, and without any opportunity for petitioners to be heard or present any proof to rebut defendants' concerns;

3. Respondents on several occasions throughout 1986 and 1987 refused to accept any individualized materials from petitioners and insisted that as a class, they all were equally unqualified; however, when petitioners established their collective credentials by compiling data from refugee faculty and deans, respondents then refused to accept generic information and demanded individualized original documents from the government of Vietnam and established requirements their own licensing program manager has testified "made no sense";

4. Respondents expressed their antipathy toward all Vietnamese in closed sessions, as revealed by the testimony of former staff and handwritten notes of the meetings, including an expression of one defendant's "*great* reservations" about and "suspicions" of the Vietnamese,

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(Continued from previous page)

establish their case, defendants' *sole evidence* in the trial court was self-serving declarations of defendants and their employees prepared for the Motion for Summary Judgment that simply disclaimed any discriminatory intent.

unfounded in fact, but later attributed to his service in Vietnam 20 years before;

5. Individual respondents expressed racist sentiments regarding the Vietnamese, including one respondent who told a State Senator that the petitioners "were trained by communists" and therefore could not be trusted;[15]

6. Respondents on another occasion based their refusal to license on one anonymous allegation about a single Asian from an unidentified school and country whom he once observed having trouble with a single procedure during training;

7. At the same meeting, respondents justified their refusal to license by citation to an anonymous letter, never verified, alleging that students at the medical school in Vietnam after 1975 were affiliated with the Communist Party;

8. At a later meeting, faced with the question from the head of the staff whether the Vietnamese would be licensed if an investigation cleared every credentials and training question, the President of the Licensing Division answered "NO", and without dissent from fellow members the matter was dropped;

9. Respondents cloaked this discrimination in shifting and ad hoc licensing procedures, such as "reconsideration" before the same subcommittee that denied

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[15] The State Senator, Senator Edward Royce, was so appalled by defendants' conduct that he authored the legislation that allowed plaintiffs to be licensed through a credentialing process that forced defendants to accept documents and training certified as authentic by a panel of experts. California Bus. & Prof. Code section 2122.

licensure in closed sessions, at which the applicant was never permitted to attend, rebut concerns, be heard, or present evidence. In fact, the former head of licensing testified that "reconsideration" was a fiction.

At the same time that Vietnamese doctors were subjected to this treatment, less qualified non-Vietnamese applicants were afforded accelerated procedures and had requirements waived, as respondents disregarded credentials and gaps in training, and personally interceded in the licensing process to override adverse staff decisions.

Most notorious was a friend of the President of the Licensing Division, a respondent here, who at the very same closed meeting where he stated that the Vietnamese would never be licensed regardless of their credentials, insisted that a foreign medical graduate (an American who had graduated from a medical school in Mexico), be licensed although his file revealed legitimate licensing concerns. Nor was this the only instance of respondents' unequal treatment toward similar classes of persons. As discussed above, respondents acted to grant favorable treatment to other less qualified non-Vietnamese applicants as well.

Given the facts of this case, there is no question that respondents knew or should have known that their refusal to license Vietnamese physicians as a class was unlawful. When racial or ethnic animus forms the basis for official acts, public officials are manifestly charged with knowledge of violation of clearly established law. In *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980) *cert. denied* 449 U.S. 875, plaintiffs charged that city officials delayed issuance of liquor licenses to them by filing protests motivated by racial or ethnic animus. The Ninth Circuit rejected defendants' qualified immunity defense and

affirmed the award of damages. Writing for the Court, then-Circuit Judge Anthony Kennedy stated

> No official can in good faith impose discriminatory burdens on a person by reason for a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it.

617 F.2d at 1392

From this record, respondents' motion based on qualified immunity should have been denied. Indeed, denial was the initial decision of the Court of Appeal which was later vacated. In that initial decision, the Court of Appeal engaged in a lengthy discussion concerning the doctrine of qualified immunity as it applied to the individual respondents in this case. Appendix II, pp. App. 23-26. The Court concluded that granting summary judgment based on that doctrine was improper "because the parties submitted a wealth of conflicting evidence concerning [the] material issue" of respondents' discriminatory motives and intent. Appendix II, at p. App. 26.

Owing to the Court's misinterpretation of *Will*, the discussion concerning qualified immunity is completely absent in the Court's second opinion. Instead, as quoted above, the Court merely states that the individual respondents "were acting in their official capacities" and, therefore, are immune. Thus, by misreading *Will*, the Court of Appeal erred in its review of the record. That record shows that petitioners were discriminated against because of their Vietnamese status while less qualified non-Vietnamese applicants were granted favored treatment by respondents.

This Court has granted certiorari to determine whether state courts have properly interpreted, applied or extended a prior Supreme Court decision in a given situation. Stern, *et al.*, *Supreme Court Practice*, Sixth Edition, Section 4.26, p. 238 and cases cited therein. It has also granted certiorari, despite absence of a conflict, when state court decisions involve the construction and application of federal statutes and the questions raised are sufficiently important. *Id.*

Recently, this Court reaffirmed the importance of concurrent enforcement of the federal civil rights laws in state and federal courts. Writing for a unanimous court, in *Howlett v. Rose*, ___ U.S. ___ [110 S.Ct. 2340, 2438] (1990), Justice Stevens stated:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might be true – but because the Constitution and the laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular mode of procedure.

Based on this principle, the Court held that state courts could not extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. 110 S.Ct. at 2447. Here, as in *Howlett*, the Court should grant certiorari to prevent the states from nullifying an important remedy afforded all citizens under the federal civil rights laws.

CONCLUSION

For these reasons set forth above, this petition for certiorari should be granted. If the misreading of *Jett* and *Will* is allowed to stand, plaintiffs will be denied a damage remedy against state entities and individual defendants under both sections 1981 and 1983. This sweeps far beyond the holding in those decisions and denies plaintiffs an important remedy under the civil rights laws.

In this case, petitioners have produced ample evidence to show that, from 1986-1988, they and other Vietnamese physicians were denied medical licenses because of bias, prejudice and unfounded suspicion by respondents. Based on this evidence, petitioners should be allowed the opportunity to go to trial and obtain the relief they seek.

Respectfully submitted,

ROBERT FELLMETH
Center for Public Interest Law
UNIVERSITY OF SAN DIEGO
Alcala Park
San Diego, CA 92110
(619) 260-4806
Counsel of Record

CARL K. OSHIRO
JULIE D'ANGELO
Center for Public Interest Law
1160 Battery Street, Suite 340
San Francisco, CA 94111
(415) 544-8832

August 14, 1990

APPENDIX I

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEALS OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

LE BUP THI DAO et al.,

Real Parties in Interest.

_____/

FILED
FEB 26 1990
Court of Appeal
First App. Dist.
By RON D.
BARROW, Deputy

A046101
(San Francisco
Super. Ct. No.
876321)

LE BUP THI DAO et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Real Parties in Interest.

_____/

A046132
(San Francisco
Super. Ct. No.
876321)

A class action challenging alleged discriminatory licensing practices of the Board of Medical Quality Assurance (BMQA) has produced these petitions demonstrating that virtually everyone involved objects to some aspect of a pair of orders made by respondent court in connection with a motion for summary judgment.[1] For the reasons hereinafter developed, we determine that only one group of parties has some entitlement to relief.

BACKGROUND

The underlying action was initiated by four Vietnamese graduates of the University of Saigon Medical School, joined by the Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States (the Committee).[2] The named defendants were the

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[1] In light of the multiplicity of petitioners and real parties in interest, the parties' trial court designations as plaintiffs and defendants will in the interests of simplicity and clarity be employed throughout this opinion.

[2] With respect to the Committee the complaint alleges it "is an unincorporated association headquartered in Orange County, California. The Committee has filed for incorporation as a non-profit corporation under the laws of the State of California and the matter is pending. The Committee has a dues paying membership of approximately 100 Vietnamese refugees. Said membership is composed of licensed physicians and applicants for medical licensure throughout the United States. The [C]ommittee's organizational purpose is to ensure that its members are provided full and equal access to professional training, employment and licensure in the medical field."

An additional named plaintiff, Catholic Community Services, was dropped as a party plaintiff prior to the summary judgment motion.

BMQA, its Division of Licensing and its Credentials Committee; the Department of Consumer Affairs as "the duly organized and constituted parent agency of BMQA"; and various individuals who occupy official positions with these entities.

The introductory allegations of the complaint provide an overview: "This action is a class action on behalf of foreign medical school graduates from Vietnam ("FMGs") who have been unlawfully denied a license to practice their profession in California by the discriminatory, illegal, arbitrary and unfounded actions of . . . (BMQA) and certain of its members and employees. . . . [¶] BMQA has been and remains engaged in acts and practices to artificially and invidiously deprive large numbers of FMG applicants of a California medical license without regard to competency standards and for anti-competitive, discriminatory and other improper purposes. These acts, many of which are unlawful in and of themselves, include the conduct of secret meetings with agents of the California[] Medical Association and others, discriminatory use of statutory criteria for licensure, falsifying minutes of meetings and other official documents, fabrication of nonexistent criteria for licensure, failure and refusal to follow statutory mandates, avoidance of required administrative procedures, unfounded charges against applicants and refusal to deal fairly and forthrightly with applicants." More particularly, plaintiffs alleged that (1) "defendants at a closed meeting on January 30-31, 1986 decided to suspend processing of all applications for licensure from persons who graduated from Vietnamese medical schools before or after 1975," and (2) at a meeting conducted on June 25-26,

1987, "defendants announced that no post-1975 Vietnamese graduate would receive a license" until such persons "fulfill[ed] new requirements for licensure," thereby "violat[ing] both the California Administrative Procedure Act and the California Open Meeting Law."

Based upon these general allegations, and additional allegations detailing the treatment the four individual plaintiffs received from defendants, plaintiffs set forth causes of action seeking (1) damages and injunctive relief for violation of the Fourteenth Amendment's guarantees of equal protection and due process (2) damages for violation of 42 U.S.C. section 1981 (3) damages for violation of 42 U.S.C. section 1983 (4) damages for violation of 42 U.S.C. section 1985 (5) damages for violation of 42 U.S.C. section 1986 (6) damages for violation of the Administrative Procedure Act (Gov. Code, § 11340 et seq.) and (7) declaratory and injunctive relief for violation of the Open Government Act (Gov. Code, § 11120 et seq.). The substantive portion of the complaint concluded with an omnibus cause of action for declaratory and injunctive relief based upon all matters "hereinbefore alleged."[3]

In due course defendants moved for summary judgment or summary adjudication of issues. The grounds for the motion relevant to these proceedings were that (1) "Plaintiff Committee has no standing to assert the constitutional rights of the individual plaintiffs" (2) "Certain issues and claims in this matter are now moot" and (3)

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[3] Additional causes of action seeking damages for violation of the Unruh Civil Rights Act (Civ. Code, § 51) and the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.) were subsequently dismissed by plaintiffs.

"By reason of immunity, defendants are not liable for suit for violation of 42 U.S.C. sections 1981, 1983, 1985 or 1986." As part of their motion defendants also sought an award of costs, including attorneys fees, pursuant to 42 U.S.C. section 1988.

After receiving voluminous papers, prodding the parties into narrowing the areas of dispute by stipulation, and conducting two hearings on the motion, respondent court made two orders (both filed on May 19, 1989) in which it ruled that (1) pursuant to stipulation plaintiffs' claims based upon 42 U.S.C. section 1983, 1985, and 1986, were dismissed as against the institutional defendants (2) by reason of a split of authority the institutional defendants were not entitled to summary judgment on the claim based upon 42 U.S.C. section 1981 (3) the individual defendants were clothed with "qualified immunity" against all of plaintiffs' claims (4) the Committee had standing but only to pursue claims for declaratory and injunctive relief, not damages, by reason of the enactment of Business and Professions Code section 2122, and (5) "[n]o other issue has been properly presented for summary adjudication."

Unhappy with these determinations, plaintiffs and defendants each filed a petition for extraordinary mandamus relief. Alternative writs were issued.

REVIEW

Our usual practice in dealing with situations where both sides are unhappy with trial court rulings, orders, or judgments is to deal with the points raised by one side before progressing to the points urged by the other side.

With these petitions, however, we have determined that the most logical analytical progression requires some interlineation of the contentions advanced by the parties.

I

We first turn to defendants' petition (A046101). Respondent court ruled, and plaintiffs do not dispute, that the state agencies named in the complaint have immunity from suit for purposes of 42 U.S.C. sections 1983, 1985, and 1986. The ruling that comparable immunity did not extend to section 1981 was correct. (See *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1035, fn. 12.) Defendants' elaborate arguments to the contrary are not persuasive because they are founded on considerations derived from application of the Eleventh Amendment to actions commenced in federal court. But the Eleventh Amendment does not apply to actions brought in state courts. (See *Will v. Michigan Dept. of State Police* (1989) ___ U.S. ___ (109 S.Ct. 2304, 2307).)

Yet although defendants may have lost this battle, plaintiffs cannot win the war. Plaintiffs invoked section 1981 solely in connection with one of their claims for damages alleged in their complaint. Less than a year ago the United States Supreme Court held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." (*Jett v. Dallas Independent School Dist.* (1989) ___ U.S. ___ (109

S.Ct. 2702, 2721-2722).)[4] A further difficulty is that section 1983 does not apply to claims against a State. (*Will v. Michigan Dept. of State Police, supra,* at pp. ___ [109 S.Ct. 2304 at pp. 2307-2308, 2312]; see *Pyne v. Meese* (1985) 172 Cal.App.3d 292, 401-403.) What defendants choose to do with these recent holdings – which were issued after respondent court made its ruling – is up to them. All we can say at present is that no error occurred when the immunity claim by the institutional defendants was rejected.

II

In their petition (A046132) plaintiffs ask us to overturn the determination by respondent court that the individual defendants enjoy immunity from plaintiffs' damage claims. To continue the theme developed in part I, that determination has been vindicated by recent related developments from the United States Supreme Court.

Insofar as respondent court's determination found against plaintiffs on their claim based upon 42 U.S.C section 1983, that ruling is invulnerable for a reason

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[4] Plaintiffs are correct in noting that the lead opinion in *Jett* was only a plurality opinion signed by four Justices. But while that opinion may fall short of an iron-clad holding, Justice Scalia (who filed a separate opinion "concurring in part and concurring in the judgment") disagreed with the plurality only on a point of methodology. As a matter of practical reality, the *Jett* plurality opinion represents the majority viewpoint of the Court. In any event, and however imperfectly expressed, we think that the *Jett* plurality trumps all of the lower court authorities to the contrary relied upon by plaintiffs.

which could not be anticipated by either the court or the parties. In *Will v. Michigan Dept. of State Police, supra,* ___ U.S. ___ (109 S.Ct. 2304 at pp. 2311-2312), the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" and therefore cannot face liability for damages. Lesser federal courts have reached the same conclusion with respect to sections 1985 and 1986. (See *Coffin v. South Carolina Dept. of Social Services* (D.S.C. 1983) 562 F.Supp. 579, 585-586 and authorities cited.)

Defendants submitted considerable, uncontradicted evidence in support of their claim that an undisputed material fact was that the "Individual defendants . . . were at all times material to this matter state officials acting in their official capacities under color of State Law." Those defendants can therefore face no liability for monetary damages as to sections 1983, 1985, and 1986.

There remains only plaintiff's cause of action based on section 1981. We believe this particular aspect of the controversy has become moot. If it is assumed that respondent court's ruling was erroneous because it took insufficient account of the factor of the individual defendants' unlawful motive for their actions (see *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.* (9th Cir. 1988) 838 F.2d 1031, 1049-1051), plaintiffs will be unable to recover the damages they seek. As previously established, damages for a violation of section 1981 can be had only pursuant to section 1983 (*Jett v. Dallas Independent School Dist., supra,* ___ U.S. ___ (109 S.Ct. 2702 at pp. 2721-2722), but the individual defendants have immunity against the section

1983 claims because they were acting solely in their official capacities. (*Will v. Michigan Dept. of State Police, supra,* ___ U.S. ___ [109 S.Ct. 2304 at pp. 2311-2312].) In these circumstances mootness is established because no effectual relief could be granted. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 517, p. 499.)

III

The preceding discussion has resolved the issues of plaintiffs' damage claims, and has answered the sole contention of error pressed by plaintiffs. We next address arguments by defendants regarding whether plaintiffs' claims for declaratory and injunctive relief are moot.

Pursuant to a stipulation between the parties, one of the orders filed by respondent court specified that the individual plaintiffs "are no longer seeking declaratory or injunctive relief."[5] Plaintiffs do not dispute this ruling. There consequently seems no point to considering mootness as to those plaintiffs.

Respondent court rejected defendants' claim that the Committee had no standing to seek any kind of relief, but the court's orders restricted the Committee's standing to certain specific aspects of the declaratory and injunctive relief claims regarding the alleged violations of the Administrative Procedure and Open Meeting Acts. Defendants assert that the Committee lacks standing, thus mooting all claims for declaratory and injunctive

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[5] The parties stipulated, and respondent court ordered, that the Committee "is not entitled to any monetary relief for itself or in [*sic*: on] behalf of any other person."

relief. It has been the practice of this court to decide questions of organizational standing only with the benefit of a full record that provides some concrete basis for evaluating inanimate entities. (See *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 892-893; cf. *Environmental Law Fund. Inc. v. Town of Corte Madera* (1975) 49 Cal.App.3d 105.) The soundness of this approach, which implicitly treats the issue as one of fact, appears pertinent here, given that (insofar as can be determined from the limited record presented to us) defendants submitted nothing in the way of supporting evidence required by Code of Civil Procedure section 437c, subdivision (b). As respondent court put it: "The moving papers fail to establish that this alleged unincorporated association . . . lacks standing." Accordingly, we do not believe there is an adequate basis for our deciding as a matter of law that respondent court erred in not terminating the equitable relief aspects of this litigation.

Defendants present a contention which, on paper, constitutes a persuasive argument that the remaining issues of equitable relief have been rendered moot by the enactment of Business and Professions Code section 2122.[6] Respondent court did not address this issue. Its

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[6] The effect of this statute, which figured prominently in the parties' stipulation which underlay one of the May 19th orders, deserves some explanation.

One of the major points of plaintiffs' complaint was that defendants had refused to follow usual practice by appointing a Faculty Committee in Exile, composed of former faculty members of the University of Saigon Medical School, which would evaluate and make recommendations concerning licensing of persons claiming to be graduates of that school. Section

(Continued on following page)

reasons for doing so are unclear. In the first of the May 19th orders the court took pains to make clear that it was expressing "no opinion on any challenge or defense to such declaratory and injunctive relief on the grounds of mootness, irrelevancy or other grounds." In the second of the orders the court stated: "No other issue has been properly presented for summary judgment."

The summary judgment statute seems quite clear about the granting or denial of a motion for summary judgment. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., 437c, subd. (c).) The grounds for denying the motion are clear: (1) the existence of "a triable issue as to one or more material facts" (*id.*, subd. (g)); (2) the moving party's failure to comply with the requirement of "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed . . . [with] reference to the supporting evidence" (*id.*, subd. (b)); (3) "in the discretion of the court, where the only proof of a material fact offered in support of the

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(Continued from previous page)

2122 mandated the creation of such a committee for this purpose and directs that the BMQA licensing division "shall accept the recommendation of the committee, unless the division finds, after notice and opportunity for hearing, that the committee's recommendation is not based upon substantial evidence." (Bus. & Prof. Code, § 2122, subd. (c).) The committee's members were to have been appointed by February 1, 1988. (*id.*, subd. (a).) Section 2122 contains an automatic repeal provision for January 1, 1992. (*id.*, subd. (d).)

summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof" (*id.*, subd. (e)); or (4) "[i]f it appears from the affidavits submitted in opposition . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" (*id.*, subd. (h)).

Following the lead of Division Two, this court has held that "[a] trial court may not refuse to hear a summary judgment motion filed within the time limits of section 437c." (*Sentry Ins. Co. v. Superior Court* (1989) 207 Cal.App.3d 526, 529; see *Wells Fargo Bank v. Superior Court* (1988) 206 Cal.App.3d 918.) A logical corollary of this principle is that a trial court must rule on all aspects of a motion for summary judgment or summary adjudication unless there is ground specified in section 437c for withholding a decision. A trial court is not allowed the luxury of not deciding or of not expressing its opinion, as did respondent court, concerning a matter brought forward in conformity with statutory procedures. It appears from a fair reading of section 437c that a trial court is not permitted to retreat into enigmatic silence or opaque remarks. According to subdivision (g): "Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which

indicates that a triable controversy exists. *The court shall also state its reasons for any other determination.* The court shall record its determination by court reporter or written order." (Emphasis added.)

Respondent court may well have had a valid reason for denying defendants' motion as to this point. Unfortunately, if such a reason exists it is not discernible from the record before us. As the cause will have to be returned to respondent court for entry of a new order, the situation may be clarified at that time.

IV

Defendants' final contention is that respondent court "abused its discretion in refusing to rule" on their application for attorneys' fees pursuant to 42 U.S.C. section 1988. The preceding discussion concerning the flaw in the ruling on defendants' arguments relative to plaintiffs' equitable relief claims is equally applicable to this contention.

In A046101 a peremptory writ of mandate will issue directing respondent court to vacate its orders of May 19, 1988, and enter a new order in conformity with this opinion.

In A046132 the petition for a peremptory writ is denied and the alternative writ is discharged.

Poché, Acting P.J.

WE CONCUR:

Channell, J.

Perley, J.

Bd. of Medical Quality Assurance v. Superior Court
A046101

Le Bup Thi Dao v. Superior Court
A046132

APPENDIX II

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEALS FOR THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCC COUNTY,

Respondent,

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Real Parties in Interest.

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FILED
JAN 5, 1990
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By RON D.
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(San Francisco
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LE BUP THI DAO et al.,

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SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Real Parties in Interest.

_____/

A046132
(San Francisco
Super. Ct. No.
876321)

A class action challenging alleged discriminatory licensing practices of the Board of Medical Quality Assurance (BMQA) has produced these petitions demonstrating that virtually everyone involved objects to some aspect of a pair of orders made by respondent court in connection with a motion for summary judgment.[1] For the reasons hereinafter developed, we determine that both sides have some entitlement to relief.

BACKGROUND

The underlying action was initiated by four Vietnamese graduates of the University of Saigon Medical School, joined by the Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States (the Committee).[2] The named defendants were the

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[1] In light of the multiplicity of petitioners and real parties in interest, the parties' trial court designations as plaintiffs and defendants will in the interests of simplicity and clarity be employed throughout this opinion.

[2] With respect to the Committee the complaint alleges it "is an unincorporated association headquartered in Orange County, California. The Committee has filed for incorporation as a non-profit corporation under the laws of the State of California and the matter is pending. The Committee has a dues paying membership of approximately 100 Vietnamese refugees. Said membership is composed of licensed physicians and applicants for medical licensure throughout the United States. The [C]ommittee's organizational purpose is to ensure that its members are provided full and equal access to professional training, employment and licensure in the medical field."

An additional named plaintiff, Catholic Community Services, was dropped as a party plaintiff prior to the summary judgment motion.

BMQA, its Division of Licensing and its Credentials Committee; the Department of Consumer Affairs as "the duly organized and constituted parent agency of BMQA"; and various individuals who occupy official positions with these entities.

The introductory allegations of the complaint provide an overview: "This action is a class action on behalf of foreign medical school graduates from Vietnam ("FMGs") who have been unlawfully denied a license to practice their profession in California by the discriminatory, illegal, arbitrary and unfounded actions of . . . (BMQA) and certain of its members and employees. . . . [¶] BMQA has been and remains engaged in acts and practices to artificially and invidiously deprive large numbers of FMG applicants of a California medical license without regard to competency standards and for anti-competitive, discriminatory and other improper purposes. These acts, many of which are unlawful in and of themselves, include the conduct of secret meetings with agents of the California[] Medical Association and others, discriminatory use of statutory criteria for licensure, falsifying minutes of meetings and other official documents, fabrication of nonexistent criteria for licensure, failure and refusal to follow statutory mandates, avoidance of required administrative procedures, unfounded charges against applicants and refusal to deal fairly and forthrightly with applicants." More particularly, plaintiffs alleged that (1) "defendants at a closed meeting on January 30-31, 1986 decided to suspend processing of all applications for licensure from persons who graduated from Vietnamese medical schools before or after 1975," and (2) at a meeting conducted on June 25-26,

1987, "defendants announced that no post-1975 Vietnamese graduate would receive a license" until such persons "fulfill[ed] new requirements for licensure," thereby "violat[ing] both the California Administrative Procedure Act and the California Open Meeting Law."

Based upon these general allegations, and additional allegations detailing the treatment the four individual plaintiffs received from defendants, plaintiffs set forth causes of action seeking (1) damages and injunctive relief for violation of the Fourteenth Amendment's guarantees of equal protection and due process (2) damages for violation of 42 U.S.C. section 1981 (3) damages for violation of 42 U.S.C. section 1983 (4) damages for violation of 42 U.S.C. section 1985 (5) damages for violation of 42 U.S.C. section 1986 (6) damages for violation of the Administrative Procedure Act (Gov. Code, § 11340 et seq.) and (7) declaratory and injunctive relief for violation of the Open Government Act (Gov. Code, § 11120 et seq.). The substantive portion of the complaint concluded with an omnibus cause of action for declaratory and injunctive relief based upon all matters "hereinbefore alleged."[3]

In due course defendants moved for summary judgment or summary adjudication of issues. The grounds for the motion relevant to these proceedings were that (1) "Plaintiff Committee has no standing to assert the constitutional rights of the individual plaintiffs" (2) "Certain issues and claims in this matter are now moot" and (3)

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[3] Additional causes of action seeking damages for violation of the Unruh Civil Rights Act (Civ. Code, § 51) and the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.) were subsequently dismissed by plaintiffs.

"By reason of immunity, defendants are not liable for suit for violation of 42 U.S.C. sections 1981, 1983, 1985 or 1986." As part of their motion defendants also sought an award of costs, including attorneys fees, pursuant to 42 U.S.C. section 1988.

After receiving voluminous papers, prodding the parties into narrowing the areas of dispute by stipulation, and conducting two hearings on the motion, respondent court made two orders (both filed on May 19, 1989) in which it ruled that (1) pursuant to stipulation plaintiffs' claims based upon 42 U.S.C. section 1983, 1985, and 1986, were dismissed as against the institutional defendants (2) by reason of a split of authority the institutional defendants were not entitled to summary judgment on the claim based upon 42 U.S.C. section 1981 (3) the individual defendants were clothed with "qualified immunity" against all of plaintiffs' claims (4) the Committee had standing but only to pursue claims for declaratory and injunctive relief, not damages, by reason of the enactment of Business and Professions Code section 2122, and (5) "[n]o other issue has been properly presented for summary adjudication."

Unhappy with these determinations, plaintiffs and defendants each filed a petition for extraordinary mandamus relief. Alternative writs were issued.

REVIEW

Our usual practice in dealing with situations where both sides are unhappy with trial court rulings, orders, or judgments is to deal with the points raised by one side before progressing to the points urged by the other side.

With these petitions, however, we have determined that the most logical analytical progression requires some interlineation of the contentions advanced by the parties.

I

We first turn to defendants petition (AO46101). Respondent court ruled, and plaintiffs do not dispute, that the state agencies named in the complaint have immunity from suit for purposes of 42 U.S.C. sections 1983, 1985, and 1986. The ruling that comparable immunity did not extend to section 1981 may have been correct at the time (cf. *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1035, fn. 12 [finding no immunity] and *Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1988) 861 F.2d 198, 201 [finding immunity]); it has, however, been overtaken by several very recent decisions of the United States Supreme Court.

Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

In *Patterson v. McLean Credit Union* (1989) ___ U.S. ___ (109 S.Ct. 2363), the court held that the remedial ambit of section 1981 is confined to situations where a contract is at issue: "The most obvious feature of the provisions is the restriction of its scope to forbidding discrimination in

the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief." (*Id.* at p. ___ [109 S.Ct. 2363 at p. 2372].) More pertinently, in *Jett v. Dallas Independent School Dist.* (1989) ___ U.S. ___ (109 S.Ct. 2702), the court held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." (*Id.* at p. ___ [109 S.Ct. 2702 at pp. 2721-2722].)[4]

Plaintiffs invoked section 1981 solely in connection with one of their claims for damages alleged in their complaint. There is absolutely nothing in plaintiffs' complaint giving the slightest hint that their dispute with defendants rests upon anything resembling a contractual basis. Absent the contractual foundational specified by *Patterson*, the only damages claim plaintiffs can assert is required by *Jett* to be brought pursuant to section 1983. The fly in the ointment is that section 1983 does not apply to claims against a State. (*Will v. Michigan Dept. of State Police* (1989) ___ U.S. ___ [109 S.Ct. 2304]; see *Pyne v.*

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[4] Plaintiffs are correct in noting that the lead opinion in *Jett* was only a plurality opinion signed by four Justices. But while that opinion may fall short of an iron-clad holding, the ultimate opinion of the plurality opinion does seem to be closer to the views of Justice Scalia (who filed a separate opinion "concurring in part and concurring in the judgment") than the four dissenting Justices. In any event, and however imperfectly expressed, we think that the *Jett* plurality trumps all of the lower court authorities to the contrary relied upon by plaintiffs.

Meese (1985) 172 Cal.App.3d 292, 401-403.) We therefore agree with those defendants comprising units of the State of California that they are entitled to summary judgment on the cause of action plaintiffs purported to base on section 1981.

Plaintiffs' arguments against this conclusion are not persuasive. We do agree with plaintiffs that much of defendants' analysis based upon the Eleventh Amendment to the United States Constitution is essentially beside the point because that amendment does not apply in state court actions. (*Will v. Michigan Dept. of State Police, supra,* ___ U.S. ___ [109 S.Ct. 2304 at p. 2307].) The very decision relied upon by plaintiffs for the proposition that "California authority on the issue of whether state agencies are subject to suit under 42 U.S.C. Section 1981 is unequivocal: they are" expressly recognizes that "[w]here the Supreme Court of the United States interprets a statute enacted by the Congress, that interpretation is binding upon the state courts of California." (*Filipino Accountants' Assn. v. State Bd. of Accountancy, supra,* 155 Cal.App.3d 1023 at p. 1034.) The *Patterson, Jett,* and *Will* decisions deal with the substantive content and scope of the federal statutes plaintiffs invoke. Our discussion has followed what we believe are the salient aspects of those decisions without regard to the status of the forum where claims such as plaintiffs' are commenced. Considerations of the Eleventh Amendment have consequently played no part in our analysis.

With the institutional defendants now absolved of plaintiffs' damage claims, we next consider whether a similar conclusion extends to the individual defendants.

II

In their petition (AO46132) plaintiffs ask us to overturn the determination by respondent court that the individual defendants enjoy immunity from plaintiffs' damage claims.

This is what respondent court ruled: "Insofar as the motion requests an adjudication that the individual defendants are entitled to immunity from the various claims that have been asserted against them, the motion will be GRANTED. . . . [¶] [T]he uncontroverted facts do establish the right to qualified immunity. The defendants' actions in insisting upon additional verification of the adequacy of the curriculum at the University of Saigon Medical School, as described in the voluminous declarations and deposition transcripts without material contradiction (as distinguished from the manner in which those actions are characterized in the legal argument of counsel) must 'reasonably be thought consistent with the rights' defendants are alleged to have violated. *Anderson v. Creighton* (1987), ___ U.S. ___, 107[] S.Ct. 3034, 3038. The defendants are shielded from liability for damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818; *Little v. City of Seattle* (9th Cir. 1988), 863 F.2d 681. There simply is no basis to conclude that the defendants did not believe and could not reasonably have believed they were acting properly in demanding confirmation of the post-1975 Saigon curriculum as they did.

"With respect to the claim that defendants violated plaintiffs' constitutional rights and 42 U.S.C. section 1981

by basing their actions upon impermissible racial or ethnic factors, qualified immunity is not established unless this allegation has been negated. *Guiterrez [sic: Gutierrez] v. Municipal Court of S.E. Judicial Dist.* (9th Cir. 1988) 838 F.2d 1031, 1049-1051 *vacated as moot*, 57 U.S.L.W. 3687 (1989). However, the declarations of the moving parties do negate this allegation, and the opposing evidence cited by the plaintiffs is not sufficient to raise a triable issue of fact concerning this material issue. (See, e.g., Plaintiffs' Response to Defendants' Statement of Undisputed Facts, response to Defendants' Fact #31-32.)"

Respondent court cited the most recent views of the United States Supreme Court on what it takes to establish qualified official immunity. "When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.' [Citation.] On the other hand, permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. [Citation.] Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 341 [] (1986) (qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law'). . . . Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for

an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action [citation] assessed in light of the legal rules that were 'clearly established' at the time it was taken [citation]." (*Anderson v. Creighton* (1987) 483 U.S. 635, 638-639.)

In *Gutierrez v. Mun. Ct. of S.E. Judicial Dist., supra,* 838 F.2d 1031, the Ninth Circuit adopted principles formulated by the District of Columbia Circuit and stated: "We hold . . . that where the lawfulness of a challenged act is dependent upon the actor's motive or intent, the purpose for which the act was undertaken must be analyzed and not just the act itself. We also hold that in deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element, the court must consider the actor's intent in carrying out the act that is alleged to have resulted in the violation of the plaintiff's rights. Specifically, we . . . agree . . . that qualified immunity is not a defense in cases involving intentional racial or other similar discrimination, including national origin." (*Id.* at pp. 1049-1051.)

That portion of respondent court's ruling finding qualified immunity for "defendants' actions in insisting upon additional verification of the adequacy of the curriculum at the University of Saigon Medical School" cannot be reconciled with *Gutierrez* because it focuses upon the objective reasonableness of the actions without regard for defendants' motives or intents in doing so. Defendants' actions may well have been objectively reasonable for a regulatory authority acting in so important an area as physician licensing. There can be no dispute that "unlawful motive," in the form of "intentional racial . . . discrimination" by defendants, "is a critical

element" of the causes of action plaintiffs have founded upon federal statute and constitutional provision. (See *Gutierrez v. Mun. Ct. of S.E. Judicial Dist., supra,* 838 F.2d 1031 at p. 1047; *Springer v. Seamen* (1st Cir. 1987) 821 F.2d 871, 880.) Notwithstanding the specific holding of *Gutierrez* that "qualified immunity is not a defense in cases involving intentional racial or other similar discrimination," which alone suffices to end this discussion, the remainder of the basis for the ruling is also flawed because the parties submitted a wealth of conflicting evidence concerning this material issue. It thus appears that with the exception of the claim based upon 42 U.S.C. section 1981, whose underpinnings have been obliterated by *Patterson v. McLean Credit Union, supra,* ___ U.S. ___ (109 S.Ct. 2363), the ruling on qualified immunity of the individual defendants cannot stand.

III

The preceding discussion has established the validity of damage claims based upon 42 U.S.C. sections 1983, 1985, and 1986, and has answered the sole contention of error pressed by plaintiffs. We next address arguments by defendants regarding whether plaintiffs' claims for declaratory and injunctive relief are moot.

Pursuant to a stipulation between the parties, one of the orders filed by respondent court specified that the individual plaintiffs "are no longer seeking declaratory or injunctive relief."[5] Plaintiffs do not dispute this ruling.

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[5] The parties stipulated, and respondent court ordered, that the Committee "is not entitled to any monetary relief for itself or in [*sic*: on] behalf of any other person."

There consequently seems no point to considering mootness as to those plaintiffs.

Respondent court rejected defendants' claim that the Committee had no standing to seek any kind of relief, but the court's orders restricted the Committee's standing to certain specific aspects of the declaratory and injunctive relief claims regarding the alleged violations of the Administrative Procedure and Open Meeting Acts. Defendants assert that the Committee lacks standing, thus mooting all claims for declaratory and injunctive relief. It has been the practice of this court to decide questions of organizational standing only with the benefit of a full record that provides some concrete basis for evaluating inanimate entities. (See *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 892-893; cf. *Environmental Law Fund, Inc. v. Town of Corte Madera* (1975) 49 Cal.App.3d 105.) The soundness of this approach, which implicitly treats the issue as one of fact, appears pertinent here, given that (insofar as can be determined from the limited record presented to us) defendants submitted nothing in the way of supporting evidence required by Code of Civil Procedure section 437c, subdivision (b). As respondent court put it: "The moving papers fail to establish that this alleged unincorporated association . . . lacks standing." Accordingly, we do not believe there is an adequate basis for our deciding as a matter of law that respondent court erred in not terminating the equitable relief aspects of this litigation.

Defendants present a contention which, on paper, constitutes a persuasive argument that the remaining issues of equitable relief have been rendered moot by the enactment of Business and Professions Code section

2122.[6] Respondent court did not address this issue. Its reasons for doing so are unclear. In the first of the May 19th orders the court took pains to make clear that it was expressing "no opinion on any challenge or defense to such declaratory and injunctive relief on the grounds of mootness, irrelevancy or other grounds." In the second of the orders the court stated: "No other issue has been properly presented for summary judgment."

The summary judgment statute seems quite clear about the granting or denial of a motion for summary judgment. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The grounds for denying the motion are clear: (1) the existence of "a triable issue as to one or more

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[6] The effect of this statute, which figured prominently in the parties' stipulation which underlay one of the May 19th orders, deserves some explanation.

One of the major points of plaintiffs' complaint was that defendants had refused to follow usual practice by appointing a Faculty Committee in Exile, composed of former faculty members of the University of Saigon Medical School, which would evaluate and make recommendations concerning licensing of persons claiming to be graduates of that school. Section 2122 mandated the creation of such a committee for this purpose and directs that the BMQA licensing division "shall accept the recommendation of the committee, unless the division finds, after notice and opportunity for hearing, that the committee's recommendation is not based upon substantial evidence." (Bus. & Prof. Code, § 2122, subd. (c).) The committee's members were to have been appointed by February 1, 1988. (*Id.*, subd. (a).) Section 2122 contains an automatic repeal provision for January 1, 1992. (*Id.*, subd. (d).)

material facts" (*id.*, subd. (g)); (2) the moving party's failure to comply with the requirement of "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed . . . [with] reference to the supporting evidence" (*id.*, subd. (b)); (3) "in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof" (*id.*, subd. (e)); or (4) "[i]f it appears from the affidavits submitted in opposition . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" (*id.*, subd. (h)).

Following the lead of Division Two, this court has held that "[a] trial court may not refuse to hear a summary judgment motion filed within the time limits of section 437c." (*Sentry Ins. Co. v. Superior Court* (1989) 207 Cal.App.3d 526, 529; see *Wells Fargo Bank v. Superior Court* (1988) 206 Cal.App.3d 918.) A logical corollary of this principle is that a trial court must rule on all aspects of a motion for summary judgment or summary adjudication unless there is ground specified in section 437c for withholding a decision. A trial court is not allowed the luxury of not deciding or of not expressing its opinion, as did respondent court, concerning a matter brought forward in conformity with statutory procedures. It appears from a fair reading of section 437c that a trial court is not permitted to retreat into enigmatic silence or opaque remarks. According to subdivision (g): "Upon the denial

of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. *The court shall also state its reasons for any other determination.* The court shall record its determination by court reporter or written order." (Emphasis added.)

Respondent court may well have had a valid reason for denying defendants' motion as to this point. Unfortunately, if such a reason exists it is not discernible from the record before us. As the cause will have to be returned to respondent court for entry of a new order, the situation may be clarified at that time.

IV

Defendants' final contention is that respondent court "abused its discretion in refusing to rule" on their application for attorneys' fees pursuant to 42 U.S.C. section 1988. The preceding discussion concerning the flaw in the ruling on defendants' arguments relative to plaintiffs' equitable relief claims is equally applicable to this contention.

A peremptory writ of mandate will issue directing respondent court to vacate its orders of May 19, 1988, and

enter a new order in conformity with this opinion. All parties shall bear their respective costs.

Poché, Acting P.J.

WE CONCUR:

Channell, J.

Perley, J.

Bd. of Medical Quality Assurance v. Superior Court
A046101

Le Bup Thi Dao v. Superior Court
A046132

APPENDIX III

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER EIGHT

DR. LE BUP THI DAO, et al., Plaintiffs, vs. BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al., Defendants.	NO. 876 321 ORDER RE SUMMARY ADJUDICATION OF ISSUES ENDORSED FILED San Francisco County Superior Court MAY 19 1989 DONALD W. DICKINSON, Clerk BY: JERRY L. WASHINGTON Deputy Clerk

Defendants' Motion for Summary Judgment and for Attorneys' Fees under 42 U.S.C. section 1988, or in the Alternative Summary Adjudication of the Issues, as subsequently limited and restated, is ruled upon as follows.

Insofar as the motion requests an adjudication that the institutional (or "organizational") defendants are entitled to sovereign immunity from suit under 42 U.S.C. section 1981, the motion is DENIED. There admittedly is a split of authority as to whether state agencies are immune from suit under section 1981. Compare, e.g., *Yarbrough v. Illinois Dept. of Mental Health* (N.D. Ill. 1982),

538 F.Supp. 414, with *Malone v. Schenk* (C.D. Ill. 1985), 638 F.Supp. 423. *Yarbrough* and *Skyers v. Port Authority of N.Y. And N.J.* (S.D.N.Y. 1976), 431 F.Supp. 79, 83, on which it relied, recognize that whether Congress intended to override state immunity under the Eleventh Amendment (which Congress is authorized to do by both the Thirteenth and Fourteenth Amendments) must be evaluated separately for section 1981, which was adopted as part of the Civil Rights Act 1866 under the authority of the Thirteenth Amendment, and for section 1983, which was adopted as part of the Ku Klux Klan Act of 1871 under the Authority of the Fourteenth Amendment. Both cases concluded that section 1981 was intended to encompass state agencies as "persons" subject to judicial enforcement of its provisions. The court in *Malone* agreed that the legislative history of section 1981 indicated "that Congress fully intended to reach the governmental acts of the states with the Civil Rights Act of 1866," 638 F.Supp. at 428, but felt that under *Atascadero State Hospital v. Scanlon* (1985), 473 U.S. 234, state immunity exists unless "the statutue in its language unmistakenly abrogate(s) the state's Eleventh Amendment immunity," *ibid.*, and that the decisions in *Yarbrough* and *Skyers* had been "implicitly disapproved by the holding in *Atascadero.*" *id.* at 429. However, *Atascadero* held only that section 504 of the Rehabilitation Act of 1973 was not intended to override Eleventh Amendment immunity: it did not purport to modify the basic principle that the meaning of each federal statutue must be determined separately and that properly evidenced Congressional intent may be considered in determining the meaning of the words of the

statute. Since *Malone* itself recognized the apparent intention of Congress to apply section 1981 to the states, it would seem that *Yarbrough* and *Skyers* reached the correct conclusion that the statute overrides the state's immunity. Compare *Chavez-Salido v. Cabell* (C.D. Calif. 1977), 427 F.Supp. 158, 162-165; *Sethy v. Alameda Co. Water Dist.* (9th Cir. 1976), 545 F.2d 1157, 1159-1160; *Mahone v. Waddle* (3rd Cir. 1977), 564 F.2d 1018, 1030-1037. In all events, since the single California appellate decision addressing this issue has stated that state agencies are subject to suit under section 1981, *Filipino Accountants' Assn. v. State Board of Accountancy* (1984), 155 Cal.App.3d 1023, 1035 n. 12, that is the view which this court should follow.

Whether the evidence is sufficient to support the cause of action under section 1981 against the organizational defendants is not an issue which has been properly presented by the pending motion.

Insofar as the motion requests an adjudication that the individual defendants are entitled to immunity from the various claims that have been asserted against them, the motion will be GRANTED. There is authority that arguably supports the conclusion that the individual defendants are entitled to absolute immunity from liability for their respective roles in refusing to accept for the purpose of licensure the adequacy of of [sic] the curriculum at the University of Saigon Medical School after 1975, and for delaying the issuance to plaintiffs of licenses to practice medicine in California. See, e.g., *Horwitz v. Board of Medical Examiners of State of Colorado* (10th Cir. 1987), 822 F.2d 1508; *Vakas v. Rodriguez* (10th Cir. 1984), 728 F.2d 1293; *Greene v. Zank* (1984), 158 Cal.App.3d 497. However, the uncontroverted facts fail to establish

that the functions performed by defendants were sufficiently judicial in nature to warrant quasi-judical absolute immunity. See, e.g., *Cleavinger v. Saxner* (1985), 474 U.S. 193; *Schlegal v. Bebout* (9th Cir. 1987), 841 F.2d 937, 941-944. Neither has a basis for quasi-legislative absolute immunity been established.

Nonetheless, the uncontroverted facts do establish the right to qualified immunity. The defendants' actions in insisting upon additional verification of the adequacy of the curriculum at the University of Saigon Medical School, as described in the voluminous declarations and deposition transcripts without material contradiction (as distinguished from the manner in which those actions are characterized in the legal argument of counsel) must "reasonably be thought consistent with the rights" defendants are alleged to have violated. *Anderson v. Creighton* (1987), ___ U.S. ___, 107A S.Ct. 3034, 3038. The defendants are shielded from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818; *Little v. City of Seattle* (9th Cir. 1988), 863 F.2d 681. There simply is no basis to conclude that the defendants did not believe and could not reasonably have believed they were acting properly in demanding confirmation of the post-1975 Saigon curriculum as they did.

With respect to the claim that defendants violated plaintiffs' constitutional rights and 42 U.S.C. section 1981 by basing their actions upon impermissible racial or ethnic factors, qualified immunity is not established unless this allegation has been negated. *Guitierrez v. Municipal Court of S.E. Judicial Dist.* (9th Cir. 1988), 838 F.2d 1031,

1049-1051 *vacated as moot*, 57 U.S.L.W. 3687 (1989). However, the declarations of the moving parties do negate this allegation, and the opposing evidence cited by the plaintiffs is not sufficient to raise a triable issue of fact concerning this material issue. (See, e.g., Plaintiff's Response to Defendants' Statement of Undisputed Facts, response to Defendants' Fact #31-32.)

While it may be that the refusal of the defendants to have granted plaintiffs' licenses before the recent statutory amendments was unjustifiable, judicial remedies were available to have corrected any possible abuses of discretion. Assuming, arguendo, that there were such abuses and that they affected plaintiffs' constitutional rights, it does not follow that the individual board members and staff bear personal liability. The defendants' evidence does reflect facts establishing the existence of a qualified immunity as a matter of law, and, however sympathetic one may be with the predicament in which the plaintiffs found themselves, plaintiffs' evidence fails to create a triable issue concerning those facts.

Insofar as the defendants' motion requests an adjudication that the Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States lacks standing to seek declaratory and injunctive relief herein, the motion is DENIED. The moving papers fail to establish that this alleged unincorporated association (First Amended Complaint of Course paragraph 6(b)) lacks standing.

No other issue has been properly presented for summary adjudication.

DATED: May 19, 1989.

STUART R. POLLAK
STUART R. POLLAK
Judge of the Superior Court

No. 90-303 (2)

Supreme Court, U.S.
FILED
SEP 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LE BUP THI DAO, et al.,
Petitioners,

VS.

BOARD OF MEDICAL QUALITY ASSURANCE
OF THE STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF FOR THE BOARD OF MEDICAL QUALITY ASSURANCE, et al. IN OPPOSITION

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

PAUL V. BISHOP
Deputy Attorney General
(Counsel of Record)

VIVIEN HARA HERSH
SUSAN K. MEADOWS
Deputy Attorneys General

DEPARTMENT OF JUSTICE
STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY
GENERAL
1515 "K" Street, Suite 511
Sacramento, CA 94244-2550
Telephone: (916) 324-5337

Counsel for Respondents

September 14, 1990

BOWNE OF SAN FRANCISCO, INC. • 150 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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No. 90-303

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LE BUP THI DAO, et al.,
Petitioners,

VS.

BOARD OF MEDICAL QUALITY ASSURANCE
OF THE STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF FOR THE BOARD OF MEDICAL QUALITY ASSURANCE, et al. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeal (Pet. App. I, 1-14) is not reported. The opinion appended to petitioners' brief at Petitioners' Appendix II is not properly before this Court since it was withdrawn and superseded by the opinion set forth in Petitioners' Appendix I.[1] Since the Court of Appeal has issued a peremptory writ of mandate to the Superior Court of the State of California,

[1] The Court of Appeal Opinion dated January 5, 1990, Pet. App. II, was withdrawn by the Court of Appeal when it decided to reconsider the matter. The only opinion of the Court of Appeal in effect in this matter is the opinion filed February 26, 1990, Pet. App. I. Therefore, the January 5, 1990 opinion being withdrawn, all matters therein are

County of San Francisco in its case no. AO46101 and has denied the writ of mandate filed by petitioners in its case no. AO46132, the judgment of the Superior Court, although not directly subject to judicial review by this Court, is arguably properly appended as Petitioners' Appendix III. However, the petitioners have failed to append the entire judgment of the Superior Court, and so the entirety of said judgment appears in this brief as Respondents' Appendix A.

JURISDICTION

The judgment of the Court of Appeal was entered on February 26, 1990. The Supreme Court of the State of California denied petitioners' petition for hearing on May 17, 1990. The petition for a writ of certiorari was filed on August 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

STATEMENT OF THE CASE

The action under review herein is a petition for writ of mandate to the Court of Appeal of the State of California in its Case No. AO46101. Defendants/respondents[2] herein sought review of a partial summary judgment order against defendants by the Superior Court of San Francisco County in Case No. 876321 entitled *Dao, et al. v. Board of Medical Quality Assurance, et al.* The case also concerns the denial of a petition for writ of mandate to the Court of Appeal of the State of California in its Case No. AO46132. Therein, plaintiffs/petitioners sought review of the Superior Court's partial summary judgment order against plaintiffs. A copy of the full order of the Superior Court appears as Respondents' Appendix A, and a copy of the opinion of the Court of Appeal appears as Respondents' Appendix B. The defendants

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considered vacated and nullified with no force or effect. 9 Witkin, Cal. Procedure (3d ed.), Appeal, section 625, pp. 606-607.

[2] For clarity as to the parties involved, petitioners herein, Le Bup Thi Dao, et al., will be referred to in this brief as "plaintiffs" and respondents herein, Board of Medical Quality Assurance (as of January 1, 1990, known as the Medical Board of California), et al. will be referred to as "defendants."

herein are individuals acting in their official capacities and state agencies.

The First Amended Complaint of Course in this case was filed on or about November 24, 1987.[3] The complaint alleged ten causes of action requesting damages and injunctive and declaratory relief on behalf of all plaintiffs. Included in the causes of action were federal actions for damages for violations of plaintiffs' Federal Constitutional rights under 42 U.S.C. sections 1981, 1983, 1985 and 1986.[4] Defendants timely filed their answer to the complaint December 18, 1987. After answer and discovery, a trial date was set for March 20, 1989, but the matter was set over to June 5, 1989.

On April 4, 1989, defendants filed a timely motion for summary judgment or in the alternative summary adjudication of issues with points and authorities and a statement of undisputed facts under California Code of Civil Procedure section 437c (See Resp. Stat. App.). That motion is the focus of the instant petition. Plaintiffs' opposition papers were filed on April 21, 1989 and April 28, 1989. Defendants filed their reply memorandum on May 5, 1989. Hearing was held before the Honorable Stuart Pollak on May 8, 1989. On May 10, 1989, pursuant to the court's concerns, defendants filed a Supplemental Pleading Indexing Facts to Issues and plaintiffs filed a Statement of Issues for Decision.

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[3] There were no references in the complaint filed by plaintiffs to individual conduct violative of plaintiffs' civil rights. In fact, the conduct complained of was the Medical Board's denial of licensure due to alleged racial *animus*. Licenses cannot be denied by any individual member of the Division of Licensing; therefore, racial *animus* must be shown to be the primary motivation for each member of the group who voted against licensure. It should also be pointed out that in the complaint, plaintiffs admit that pre-1975 graduates of the University of Saigon Medical School were routinely licensed, and only some post-1975 graduates, like themselves, had their licensure delayed. That very acknowledgement demonstrates that those delays of licensure did not have anything to do with racial *animus*.

[4] All statutes referred to herein, with the exception of any which are set forth in full in the text of this brief, appear in Respondents' Statutory Appendix.

On May 11, 1989, a further hearing was held before the Superior Court, and the matter was taken under submission after the court requested that plaintiffs draft a partial order. On May 19, 1989, the order prepared by plaintiffs and the order re: summary adjudication of issues were filed (Resp. App. A).

On May 26, 1989, Defendants filed a petition for writ of mandate in Case No. AO46101 before the Court of Appeal of the State of California, First Appellate District, seeking review of the Superior Court order on various grounds. Said petition was summarily denied on May 31, 1989. On June 2, 1989, defendants filed a petition for review before the Supreme Court of California, and the Supreme Court granted a stay of the trial date of June 5, 1989 pending review of the petition. Requests for judicial notice of recent United States Supreme Court cases were subsequently filed.

On June 2, 1989, plaintiffs filed a petition for writ of mandate in Case No. AO46132 before the Court of Appeal of the State of California, First Appellate District, and on June 2, 1989, said petition was summarily denied.

On June 13, 1989 plaintiffs filed an answer to defendants' petition for review to the Supreme Court and included therein a request for review of the Court of Appeal's summary denial of their action also. On July 13, 1989, the Supreme Court of California granted both petitions for review and remanded each case to the Court of Appeal ordering issuance of alternative writs in each case. Alternative writs were issued by the Court of Appeal and served by August 4, 1989.

Oral arguments were held before the Court of Appeal on December 11, 1989, and on or about January 5, 1990, the court issued a proposed decision. On February 5, 1990, the Court of Appeal granted rehearing on its own motion, denying petitions for rehearing filed by both parties as moot.

On February 26, 1990, the Court of Appeal issued its opinion granting defendants' petition for writ of mandate and denying plaintiffs' petition for writ of mandate. This opinion appears in Petitioners' Appendix I and also appears herein as Respondents'

Appendix B. It is this opinion that is the subject of the instant matter.

Plaintiffs did not challenge the findings of fact in the Court of Appeal decision, but on or about April 6, 1990, plaintiffs filed a petition for review before the California Supreme Court. On or about April 30, 1990, defendants filed an answer to that petition for review. On May 17, 1990, the Supreme Court of the State of California issued its order denying plaintiffs' petition for review.

On July 12, 1990, the Court of Appeal issued its peremptory writ of mandate in Case No. AO46101 ordering the Superior Court to vacate its previous order and enter a new order in conformity with the opinion. The instant petition for writ of certiorari was filed before this Court by plaintiffs on August 15, 1990.

STATEMENT OF FACTS

Plaintiffs'/Petitioners' explication of the factual background for this action is so completely skewed and unsupported by any evidence in the record that defendants feel compelled to set forth their own statement, which is based upon the record before both the trial court and the Court of Appeal.

On or about April 30, 1975 the government in South Vietnam was overthrown by the communist government of North Vietnam. Prior to the capital, Saigon, being captured by the North Vietnamese there was a school there known as the University of Saigon Medical School. That school had a curriculum that was accepted by some licensing agencies in the various states to be equivalent to the curriculum used by medical schools in the United States. Accordingly, people who demonstrated by official documentation that they were graduates of that school and that they had completed the course of study required by law were eligible to take the required tests and to become licensed to practice medicine in those states.

However, after South Vietnam was overthrown by the communists, it became difficult to obtain official documentation or other reliable records from that country. Therefore, the American

Medical Association developed and sponsored a Faculty Counsel In Exile (FCIE) which consisted of University of Saigon Medical School faculty who had fled South Vietnam just prior to its collapse. The purpose of this FCIE was to review all the available evidence presented by refugees from Vietnam to determine whether they had properly completed the required courses of study at the University of Saigon Medical School prior to 1975. If the FCIE found the applicant had completed the required course of study, it would so certify and that certification was accepted by some of the states' licensing agencies as official documentation to establish that such person was a graduate of the University of Saigon Medical School.

The Board of Medical Quality Assurance (now Medical Board of California), Division of Licensing, is the licensing agency responsible for determining an applicant's eligibility for licensure as a physician and surgeon in California (Cal. Bus. & Prof. Code § 2005; See Resp. Stat. App.). In order to be eligible to be licensed to practice medicine in California, an applicant must, by law, provide official documents or other satisfactory evidence to the Division of Licensing that he or she has either been graduated from an approved medical school in the United States or Canada or a foreign medical school that provided an equivalent medical education (Bus. & Prof. Code §§ 2089 & 2089.5; See Resp. Stat. App.). The applicant must also provide satisfactory evidence that he or she has completed the statutorily required courses of study in medicine and pass a written examination known as the Federal Licensing Examination (FLEX). After passing that examination an applicant must complete a period of post-graduate training. To be eligible for such training in California, an applicant must have a current letter from the Division of Licensing authorizing him or her to participate in a residency program in California. Once the postgraduate training is completed, an applicant who is otherwise qualified must also take and pass an oral examination (Bus. & Prof. Code § 2080 ff; See Resp. Stat. App.).

Commencing in 1976, the Division of Licensing accepted certifications from the FCIE as official documentation that an applicant had been graduated from the University of Saigon Medical School. By 1984, approximately 400 applicants were

licensed to practice medicine in California based upon the FCIE certifications. However, in late 1983 the staff of the Board of Medical Quality Assurance and the Division of Licensing conducted a review of the state's licensing policy and questions were raised concerning the validity of FCIE certifications. Furthermore, certifications not authorized previously by the FCIE were being received. Therefore, in 1984, an investigation of FCIE was begun. The initial investigation revealed that FCIE members did not have sufficient evidence to support many of the certifications it was providing for applicants.

During 1984 and 1985, the Division of Licensing was overwhelmed by allegations of fraud perpetrated by various foreign medical schools and alleged graduates of medical schools. Therefore, because there were then no present applicants claiming to be graduates of the University of Saigon Medical School who were near eligibility for licensing, the investigation into the FCIE was not pursued vigorously until the Board of Medical Quality Assurance resources could be redirected.

Legislation specifying minimum educational requirements and limiting the discretion of the Division of Licensing became effective on January 1, 1986 (Bus. & Prof. Code §§ 2084, 2085, 2089 & 2089.5; See Resp. Stat. App.). At a regularly scheduled meeting on January 30, 1986, staff advised the members of those changes. The members of the Division of Licensing were also formally advised of the staff's concerns about various United States and foreign medical education programs. They were also advised about staff concerns with the credentials presented by applicants from Vietnamese schools and of the investigation of FCIE which had begun in 1984. At that time, decisions were made to disapprove several medical programs that did not comply with the new law and to suspend any further processing of applications from graduates of some medical programs under investigation. That suspension included applications from persons who claimed to be graduates of medical schools in Vietnam until the FCIE investigation was completed.

In 1982, plaintiffs Dao, Le, and Nguyen passed the FLEX examination and in 1984, plaintiff Tran passed it. However, none of them had submitted the required documentation of their

medical education and training. After completing the necessary postgraduate training, plaintiffs Dao and Nguyen took and passed the required oral examination in January 1986. Before the previously mentioned January 1986 decision to suspend further processing was communicated to the clerical staff of the Division of Licensing, letters were mailed to plaintiffs Dao and Nguyen advising them that they were eligible to be licensed. However, they were subsequently advised in June 1986 that they would not be licensed until they provided adequate evidence that they had completed the undergraduate medical education required for licensure in California.

In May 1986, after reviewing applications of several individuals allegedly graduated from Vietnam medical schools, the Division of Licensing formally decided to suspend the processing of applications from Vietnam medical schools pending completion of the FCIE investigation. Thereafter, all applicants from Vietnamese medical schools were advised by letter as to their status. All of the applicants were advised they must await completion of the FCIE investigation if they were relying on it to certify their records. Those claiming to have graduated after 1975 were advised that they were required to substantiate their post-1975 education with official documents or other acceptable evidence to prove they met the minimum statutory requirements for licensure in California.

In June 1986, the FCIE investigation was completed. The conclusion, based on that investigation, was that for persons graduated from the University of Saigon Medical School prior to 1975, the FCIE was properly carrying out its duty to investigate and certify only those persons who had attended and completed the required studies in those schools prior to 1975. However, all of the members of the FCIE had left Vietnam prior to the takeover in 1975 and were not authorized to attest to anything that happened thereafter.

Applicants alleging that they were graduates from medical schools in Vietnam after 1975 were advised that to be eligible for licensure in California they would be required to supply the Division of Licensing with adequate official or verifiable documentation that would establish their claims. At that time, July 1986, only 32 of the pending 147 applicants from Vietnam

medical schools were persons who claimed to have been graduated after 1975. However, the staff of the Division of Licensing tried to assist them to obtain the necessary information by compiling evidence about the medical school after the government collapsed in Saigon.

A proposal was made to the Division of Licensing to establish a second FCIE composed of ex-faculty members who had taught at the University of Saigon Medical School between 1975 and 1980. Pursuant to that proposal, the second FCIE would certify both as to the adequacy of the medical education at that school and, based on documents, records, and personal knowledge, the completion of that education by the various applicants.

During August, September, and October of 1986, information concerning the medical school and faculty members was obtained by the staff of the Division of Licensing. Stephen Wilford, the staff member responsible for analyzing that proposal, became ill and died without completing that analysis. However, Marc Grimm, the Program Manager, reviewed that proposal and recommended that it be rejected.

In November 1986, plaintiffs Dao and Nguyen requested both a formal administrative hearing on their applications and reconsideration by the Division of Licensing's Credentials Committee. They were advised by staff that they had to make a choice of one or the other. After conferring with counsel, they withdrew their requests for a formal administrative hearing and sought reconsideration by the Credentials Committee.

In December 1986, the Credentials Committee reviewed the new applications of plaintiffs Dao and Nguyen and concluded that they had again failed to provide satisfactory evidence to establish the necessary undergraduate medical education to qualify for licensure. As it had done previously in August 1986, the Division of Licensing notified the applicants of their decision. In the notice to plaintiff Dao, the Division further suggested a way in which she might satisfy the requirements and complete her medical education. That suggestion was rejected by plaintiff Dao, who then requested a formal administrative hearing as well as further

reconsideration by the Credentials Committee. In June 1987, her application was again rejected.

In January 1987, plaintiff Tran applied for an updated letter for residency so he could become eligible for ranking for a residency program in California. That application was rejected in April 1987 because before an applicant can obtain such a letter, he must provide adequate evidence that he had completed the undergraduate medical education necessary for licensure in California.

In April 1987, plaintiff Le's application to take the required oral examination was rejected because he failed to provide adequate evidence that he had completed the undergraduate medical education necessary for licensure in California.

In May of 1987, staff members from the Division of Licensing together with a representative from the Attorney General's Office interviewed several ex-faculty members from the University of Saigon Medical School who had for a while remained in Saigon after the government there had collapsed. Some of those ex-faculty members had prepared declarations and certifications concerning the curriculum of the medical school and the completion of that curriculum by various applicants. However, when interviewed, they told conflicting stories and admitted certifying as to the accuracy of some applicants' alleged medical education even though they had no personal knowledge thereof.

When the Division of Licensing received the report of the staff concerning those interviews with the ex-faculty members, it reaffirmed its decision to refuse to accept credit for the medical education allegedly received at the University of Saigon Medical School after 1975 unless the applicant could establish evidence, satisfactory to the Division of Licensing, that they had in fact obtained such training and had satisfied the requirements of California law.

In September of 1987, legislation was enacted which required the Division of Licensing to appoint a Faculty-in-Exile Committee (similar to the FCIE) to establish what the curriculum was at the University of Saigon Medical School after 1975, and to review the files of applicants who claimed to have been admitted to the University of Saigon Medical School before 1975 and graduated

during the years 1975 to 1980. After that review, the committee was empowered to make recommendations concerning licensing to the Division of Licensing. That legislation, codified as Business and Professions Code section 2122, now requires the Division of Licensing to accept the recommendation of that committee and license those individuals unless it finds that the committee's recommendation is not based upon substantial evidence (Bus. & Prof. Code § 2122; See Resp. Stat. App.). Accordingly, the Division has accepted those recommendations and licensed those applicants, including the individual plaintiffs in this case.

ARGUMENT

I

SINCE THE STATE COURT OF APPEAL, IN ITS UNPUBLISHED OPINION,[5] PROPERLY INTERPRETED AND APPLIED THIS COURT'S HOLDING IN *JETT v. DALLAS INDEP. SCH. DIST.*, 109 S.Ct. 2702 (U.S., June 22, 1989), CERTIORARI SHOULD NOT BE GRANTED ON THAT ISSUE

The issue in *Jett v. Dallas Independent School District,* 109 S.Ct. 2702 (U.S., June 22, 1989) was whether a municipality may be held vicariously liable for its employee's violations of 42 U.S.C. section 1981 on the theory of *respondeat superior.* In order to reach the analysis of this problem, this Court examined the interrelation between section 1981, which was initially part of the Civil Rights Act of 1866 and 42 U.S.C. section 1983 of the Civil Rights Act of 1871, which provided for actions at law against state actors for constitutional violations where the violations were committed under color of state law.

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[5] We should be reminded that as an opinion not certified for publication by the Court of Appeal, the opinion itself has no precedential value. California Rules of Court, Rule 977 states, in pertinent part: "(a) An opinion that is not ordered published shall not be cited or relied upon by a court or a party in any other action or proceeding . . . ." See also, *Ramon v. Moran,* 201 Cal.App.3d 431, 437, fn. 4; 247 Cal. Rptr. 117, 119, fn. 4 (Ct. App. CA, 1988).

Jett's holding with respect to governmental entities was that since section 1983 provides the exclusive remedy at law against state actors for violations of section 1981, *respondeat superior* liability is not available under section 1981 because it is not available under section 1983. *Id.* at 2723-2724. This Court necessarily analyzed the statutory history of both sections and their interrelation to reach its conclusion. In the course of its analysis, the Court announced its holding as to section 1983 being the exclusive damage remedy against state actors for section 1981 violations, since 1983 specifically provides for an action at law and because it encompasses the rights set forth in 1981. *Id.* at 2722.

A. *Jett* Does Not Create a Cause of Action at Law for Violations of Section 1981

Plaintiffs have sought to confuse this issue by giving their own "spin" to the opinion in *Jett*. Plaintiffs have inappropriately attempted to characterize that case as implying a right of action in damages for plaintiffs under 42 U.S.C. section 1981 against state actors such as the individual defendants herein, by quoting Justice O'Connor's opinion out of context.

In the context of the quotation from *Jett* on page 15 of petitioner's brief, concerning the application of section 1981 to private actors, this Court was referring only to actions for racial discrimination against private individuals who were, in fact, *not* acting "under color of state law" within the terms of section 1983. *Id.*, at 2720. Because section 1983 does not provide a damages remedy under those circumstances, a remedy was implied under section 1981. The Court goes on to say, at p. 2720:

> "That is manifestly not the case here [in an action against a governmental entity] and whatever the limits of judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express declaration by Congress concerning the scope of remedies available under a particular statute. [Citations Omitted]"

Plaintiffs' action against defendants is most assuredly an action against state actors. The individually named defendants herein

were acting as members of the Board of Medical Quality Assurance at the time that plaintiffs' licensure were delayed. Under the facts of this case, there is no way that they can be characterized as individuals acting in their private capacities who did not act under color of state law.[6]

B. Cases Prior to *Jett* and After *Atascadero* Made it Clear that No Damages Remedy Exists Under Section 1981

Petitioners contend that the Court of Appeal committed error by expanding the holding in *Jett v. Dallas Independent School District, supra,* at 2722 to preclude a cause of action for damages against a state or its agencies under 42 U.S.C. section 1981. That contention is *a fortiori* without merit because after this Court's announcement of a stringent rule of construction as to Congressional intent to abrogate sovereign immunity in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985), courts have uniformly found that section 1981 does not create a cause of action against states or state entities. In *Dellmuth v. Muth,* 109 S.Ct. 2397, 2401 (U.S., June 15, 1989) this Court definitively reaffirmed the federal rule of construction announced in *Atascadero*:

> "Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is 'unmistakeably clear in the language of the statute,' *Atascadero, supra* at 242. Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, *evidence of congressional intent must be both unequivocal and textual.*" (emphasis added)

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[6] Appearing as Respondents' Appendix C is a true and correct copy of plaintiffs' reply to defendants' Statement of Undisputed Facts, Fact No. 24, wherein plaintiffs admit not only that the individual respondents are state officials acting under color of state law, but also that they were at all times material to this matter, acting in their official capacities. This document was part of the record before the Court of Appeal and before the trial court.

In the case of *Freeman v. Michigan Dept. of State,* 808 F.2d 1174 (6th Cir. 1987), the Sixth Circuit Court of Appeals applied that rule of construction in interpreting section 1981. After a careful analysis of the law, the court specifically held that section 1981 did *not* create a cause of action against state entities. A federal district court in *Malone v. Schenk,* 638 F.Supp. 423, 429 (C.D. Ill. 1985), had previously applied the rule and reached the same conclusion. Also see *BV Engineering v. U.C.L.A.,* 858 F.2d. 1394 (9th Cir. 1988) and *Mitchell v. L.A. Comm. College Dist.,* 861 F.2d. 198 (9th Cir. 1988).

Plaintiffs apparently contend in their petition that this Court, by its statements in *Jett* concerning the fashioning of a remedy under section 1981 against private actors, somehow reversed the holdings in *Atascadero* and *Dellmuth*. This is patently absurd. *Jett* itself did not deal with sovereign immunity; it only concerned whether an action at law was available under section 1981. The law with respect to section 1981 and sovereign immunity has been settled since *Atascadero* because it is obvious that Congress expressed no unequivocal intention to abrogate sovereign immunity in section 1981, or in section 1983. (See *Will v. Mich. Dept. of State Police,* 109 S.Ct. 2304, 2312 (U.S., June 15, 1989)).

C. Plaintiffs are Not Entitled to a *Bivens* Type Action

Plaintiffs also apparently imply by their quotation at page 15 of their brief that since sovereign immunity bars an action against a state or state officials acting in their official capacities by reason of *Will v. Michigan Department of State Police,* 109 S.Ct. 2304 (U.S., June 15, 1989) (See discussion, *infra*) and because *Jett* precludes a remedy under section 1981, this Court should imply a remedy under the Fourteenth Amendment itself. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). We must first be mindful that *Bivens* implied a right of action against Federal actors, and so sovereign immunity was not even an issue.

If indeed, this is what plaintiffs imply, they are mixing two mutually exclusive concepts. The whole purpose of sovereign immunity would be defeated if such an action were implied. Plaintiffs are asking this Court to find a way to circumvent the

sovereign immunity of the various states by implying a civil damages action against the state and state officials acting in their official capacities under the Fourteenth Amendment.

Defendants point out that in *Jett,* this Court flatly rejected a similar invitation to judicially upset the federal balance of power. In response to the petitioner's request for a *Bivens*-type action implied directly from the Fourteenth Amendment, this Court responded:

> "We can find no good logic nor sound legal basis for this view; accord [citations omitted]. Given our repeated recognition that the Fourteenth Amendment was intended in large part to embody and expand the protections of the 1866 Act as against state actors, we believe that the logic of these decisions applies with equal force to petitioner's invitation to this Court to create a damages remedy broader than section 1983 from the declaration of rights now found in section 1981." *Jett v. Dallas Indep. Sch. Dist., supra,* at 2722.

D. The Holding in *Jett* is Not Limited to Municipalities

Finally, plaintiffs' attempt to characterize the Jett case as limited solely to actions brought under section 1981 against local government entities is without merit. The case itself concerns the creation of sections 1981 and 1983 and the interaction of the two statutes; the analysis concerns whether Congress intended to create a right to a damages action under section 1981 *as to state actors,* not just against local government entities. The holding is not limited to local government entities, but states very clearly:

> "*We hold* that the express 'action at law' provided by section 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the *exclusive* federal damages remedy for the violation of the rights guaranteed by section 1981 when the claim is pressed against a state actor." (emphasis added). *Jett v. Dallas Indep. School Dist., supra,* at 2722.

The phrase "pressed against a state actor" is obviously meant to distinguish the situation in which the acts proscribed under

section 1981 were undertaken by a private individual not acting under color of state law.

Therefore, certiorari should not be granted based upon the Court of Appeal's claimed erroneous interpretation of the holding in *Jett v. Dallas Independent School District, supra,* at 2722 with respect to a damages remedy under section 1981 because the court below in fact correctly stated and applied the holding in that case.

E. Plaintiffs are Also Not Entitled to Relief Because Their Action Under Section 1981 is Not Based Upon the Making and Enforcement of Contracts

In *Patterson v. McLean Credit Union,* 109 S.Ct. 2363, 2372 (U.S. June 15, 1989) this Court held: "The most obvious feature of the provisions [of 42 U.S.C. section 1981] is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, section 1981 provides no relief." *Patterson* has been extensively followed by other courts. *Courtney v. Canyon Television Appliance Rental,* 899 F.2d 845, 849 (9th Cir. 1990); *Overby v. Chevron USA, Inc.,* 884 F.2d. 470, 472 (9th Cir. 1989); *Williams v. National R.R. Passenger Corp.,* 716 F.Supp. 49, 50-52 (D.D.C. 1989). In fact, as the case itself indicates, this reading of section 1981 predated *Patterson. Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 436 (1968); *Georgia v. Rachel,* 384 U.S. 780, 791 (1966).

In light of this Court's determination in *Patterson,* it is clear under the facts of this case that plaintiffs would have no cause of action under 42 U.S.C. section 1981, *whether or not* a damages remedy could be implied under that section. The application to a medical board for a license to practice medicine involves no contractual obligation on the part of any party. There is simply no contractual basis for the damages action that plaintiffs brought against defendants under section 1981.

The *Patterson* holding was briefed before the Court of Appeal, but that court did not reach *Patterson* because of this Court's holding as to a damages remedy under section 1981 in *Jett v.*

Dallas Independent School District, supra, at 2722. Thus, even assuming, *arguendo*, that the Court of Appeal was in error in its unpublished opinion concerning *Jett*, plaintiffs would still have no remedy under section 1981.

II

THE COURT OF APPEAL CORRECTLY APPLIED THE HOLDING IN *WILL v. MICHIGAN DEPT. OF STATE POLICE*, 109 S.Ct. 2304 (U.S. June 15, 1989) TO THE FACTS OF THIS CASE

Plaintiffs' arguments that certiorari should be granted to clarify the applicability of the qualified immunity doctrine to defendants sued in their individual capacities are without merit because under the facts of this case, the issue of qualified immunity is not properly before this Court. Furthermore, it is unnecessary to grant certiorari to review the doctrine of qualified immunity in this case because that issue was *never* reached by the Court of Appeal below.

A. The Court of Appeal Did Not Reach the Issue of Qualified Immunity Because It Found No Liability

As previously set forth above, the undisputed evidence before the court below was that the individually named defendants were at all times material to this matter acting solely in their *official* capacities. If plaintiffs disagreed with defendants' Statement of Undisputed Facts, Fact No. 24 (See Resp. App. C), then it was incumbent upon them to dispute this fact at the trial court level under California Code of Civil Procedure section 437c (b) (See Resp. Stat. App.), which governs the procedures for summary judgment motions.[7] Instead, plaintiffs agreed with defendants'

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[7] "The purpose served by the summary judgment procedure is to expedite litigation by avoiding needless trials . . . It permits the court to *pierce the allegations of the pleadings to ascertain whether a genuine cause of action in fact exists* or whether the complaint is sham or feigned." (emphasis added). *Property Controllers, Inc. v. Shewfelt*, 245 Cal.App.2d 755, 761; 54 Cal. Rptr. 218, 221 (Ct. App. CA, 1966); *Reich v. Yow*, 249 Cal.App.2d 12, 14; 57 Cal. Rptr. 117, 119 (Ct. App.

statement that all of the alleged conduct complained of was official conduct and never provided the superior court or the Court of Appeal with any evidence to indicate otherwise. Therefore, the Court of Appeal found that there was "considerable, uncontradicted evidence that an undisputed material fact was that the 'individual defendants . . . were at all times material to this matter state officials acting in their official capacities under color of State Law.'" (Resp. App. B, at 8).

Plaintiffs contend that the use of a simple pleading device alleging that individual defendants are sued in their individual as well as their official capacities defeats a finding on summary judgment that the individual defendants were at all times acting in their official capacities. They contend that in spite of a finding that no federal tort occurred, these officials are still "persons" for purposes of suit under section 1983 simply because they were also sued in their individual capacities.

It has been held that acts which violate another's constitutional rights cannot be found to be official acts. On the other hand, official conduct that does not violate federal law is official action. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Scheuer v. Rhodes*, 416 U.S. 232, 237-248 (1973); *Little v. City of Seattle*, 863 F.2d 681 (9th Cir. 1988); *Foulks v. Ohio Department of Rehabilitation and Correction*, 713 F.2d 1229, 1232-1233 (6th Cir. 1983); *Kolb v. State of Ohio Department of Mental Retardation and Developmental Disabilities*, 721 F.Supp. 885, 897 (N.D. Ohio 1989). The findings of the Court of Appeal, after reviewing the evidence in this summary judgment motion *de novo*, were that the individual defendants herein were acting *solely* in their official capacities (Resp. App. B, at 8-9). Therefore, after an analysis of the evidence before it, the Court of Appeal determined that there was no evidence that the individual defendants herein had acted with racial animus when the delays in licensure occurred. The court below was not stating that the defendants were not sued in their individual capacities but rather it was stating that in a motion for summary judgment (as opposed to a motion for judgment on the

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CA, 1967); *Jack v. Wood*, 258 Cal.App.2d 639; 65 Cal. Rptr. 856, 860 (Ct. App. CA, 1968).

pleadings), where evidence is in fact presented, there was no evidence that a constitutional tort was committed.

A summary judgment motion is a review of the evidence to see whether a triable issue of fact exists. The Court of Appeal found no triable issue of fact existed concerning any federal tort and concluded that defendants' conduct was official action. In *Will v. Michigan Department of State Police, supra,* at 2312, this Court held that a state official acting in his or her official capacity is not a person for purposes of suit under section 1983. Plaintiffs' contention that a pleading tactic can defeat a summary judgment motion, where extensive evidence was reviewed, is in direct conflict with the purpose for which summary judgment motions were created: to determine whether a triable issue of fact exists. If a state official sued in both his individual and official capacities is found to have committed no unofficial act (*i.e.,* no constitutional tort) on summary judgment, he is entitled to the designation that he is a state official acting in his official capacity and therefore not a person for purposes of suit under section 1983, as set forth in *Will.*[8]

Plaintiffs' citation to the *Kolb* case, *supra,* is not supportive of their contention. The *Kolb* case was based on a summary judgment motion. After a review of the evidence, the trial court found that one defendant had arguably fired the petitioner therein based upon racial considerations and so ordered that this was a triable issue. As to two other individual defendants, the court found no evidence of a federal tort and granted summary judgment. *Id.* at 905-906. In its judgment, the *Kolb* court made no analysis whatsoever as to whether the individual defendants were entitled to qualified immunity or any kind of immunity. The *Kolb* court's

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[8] Basically, the trial court, in its decision, agreed with the Court of Appeal in finding that there was no evidence that any of the defendants based any of their actions on impermissible racial or ethnic factors (Resp. App. A at 10). Instead of finding that the individual defendants were not persons under section 1983, however, the trial court analyzed whether the defendants were therefore entitled to qualified immunity. Essentially, however, the trial court found that the individual defendants had committed no constitutional tort. The trial court issued its ruling prior to the publication of this Court's decision in *Will.*

analysis of Eleventh Amendment immunity in federal courts points out only that a state official acting under color of state law who commits a constitutional tort cannot be shielded by the Eleventh Amendment from liability; (1) if the case against the official as an individual actor is properly pleaded and (2) there is substantial evidence presented that such a tort was, in fact, committed. *Id.* at 895-898. The fact that the Court of Appeal in the instant case phrased its finding in terms of official capacity, because the issue was presented as such, instead of phrasing it in terms of lack of a triable issue of fact, as the *Kolb* court did, is a distinction without a difference.

In any case, it is plain that no qualified immunity analysis applies when there is a finding of no liability.

B. No Qualified Immunity Analysis is Warranted Because Plaintiffs Presented No Evidence to Raise A Triable Issue of Fact As to Defendants' Violation of Their Federal Constitutional Rights

The issue of qualified immunity arises *only* if an official in fact does violate a plaintiff's rights while acting under color of state law. If such an official can demonstrate that the violation was a good faith mistake, *i.e.*, that his actions did not contravene clearly established statutory or constitutional rights of which a reasonable official would have known, then that official is entitled to qualified immunity, which absolves him of liability. *Anderson v. Creighton,* 483 U.S. 635; 107 S.Ct. 3034, 3038 (1987); *Harlow v. Fitzgerald, supra,* at 818. Since there is no finding anywhere in the instant case that any of the individual defendants herein violated any of plaintiffs' constitutional rights under section 1981 or section 1983, qualified immunity is simply not an issue.

If plaintiffs had in fact presented evidence in the trial court or the Court of Appeal that their federal rights had been violated by the individual defendants purporting to act under color of state law, then it would have become necessary to determine whether these defendants were entitled to qualified immunity. However, in this case, no such evidence was ever properly presented to the trial court or made part of the record before the Court of Appeal. The statement of facts set forth in petitioners' brief is largely unsup-

ported by the record, and the alleged facts argued on pages 17 and 25 to 27 of their brief are *totally* unsupported by the record. Furthermore, the allegation contained in Petitioners' Brief at p. 24, fn. 14 is simply false.[9] This case has been extensively briefed and argued, and no court has found evidence of unlawful motivation on the part of any of the individual defendants.

Although the record is voluminous, a thorough investigation reveals that the conduct of the defendants in delaying the issuance of licenses to individual applicants who failed to establish minimum state eligibility requirements was reasonable and proper. There simply was no evidence that any of the defendants' conduct was motivated by impermissible racial or ethnic factors. Even Marc Grimm, who served as counsel for the plaintiffs and who is prominently mentioned in Petitioners' brief, admitted in a sworn statement which is part of the record, that there was no evidence of racial discrimination by any of the defendants in this case.

The record reflects that the defendants granted licensure, as physicians and surgeons, to hundreds of persons who were educated and trained by the University of Saigon Medical School without any consideration of racial or ethnic factors. The only licenses which were delayed were those for the four individual plaintiffs, and a few other similarly situated applicants. Those delays occurred because of the inability to determine education and training, not because the applicants were Vietnamese. When the plaintiffs were able to establish that they met the requirements for licensure, they were licensed. Thus, the initial delays were made by the individual defendants solely in their official

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[9] Defendants supported their motion for summary judgment with volumes of official documents concerning the processing of plaintiffs' applications, portions of depositions taken in the case (including one wherein a plaintiff admitted that there was no evidence of racial or ethnic prejudice in the delays of licensure), and affidavits from virtually every percipient witness setting forth the facts and documenting the conduct of each individual defendant with respect to the applications involved and the actions taken. In fact, the evidence revealed that some of the individual defendants named were not even members of the Division of Licensing at the time the alleged violations took place.

capacities and not otherwise and were necessary and proper to carry out the board members' duty to protect the public safety by ensuring that licensees have the proper education and training.

In summation, despite this Court's clear holding in *Will*, that "neither a State nor its officials acting in their official capacities are 'persons' under section 1983," *Id.* at 2312, and petitioners' own factual admissions (Resp. App. C), plaintiffs contend that *Will* only applies to those cases where state officials are "sued" in their official capacities and not where officials are allegedly sued in both their individual and official capacities. This limited and contorted interpretation of *Will* is based upon a purely semantic distinction between individuals "acting" in their official capacities and being "sued" in their official capacities. Such a limited interpretation would render the Court's holding in *Will* meaningless because a plaintiff who sued a state official could circumvent the holding in *Will* simply by engaging in creative pleading. In addition, of course, plaintiffs' contention would hold the entire summary judgment procedure meaningless if pleading could overcome evidence.

The facts of the instant case fall squarely within the holding of *Will*.[10] Plaintiffs cannot circumvent the clear holding in *Will* simply by *pleading* that defendants are being sued in their official and individual capacities; the undisputed facts of this case show that defendants were at all times acting as state officials in their official capacities, and not otherwise. Therefore, given the facts of this case, it was unnecessary for the Court of Appeal to even reach the question of qualified immunity; and, accordingly, this Court should not grant certiorari upon an issue which is not appropriately before it.

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[10] The Court's holding in *Will* that state officials are not subject to suit under section 1983 is consistent with Ninth Circuit case law and California case law on the subject. See *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982); *National Association for the Advancement of Colored People v. State of California*, 511 F.Supp. 1244, 1250 (1981); *Pyne v. Meese*, 172 Cal.App.3d 392, 402-403; 218 Cal. Rptr. 87, 91-92 (Ct. App. CA, 1985).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari in this matter should be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

PAUL V. BISHOP
Deputy Attorney General
(Counsel of Record)

VIVIEN HARA HERSH
SUSAN K. MEADOWS
Deputy Attorneys General

Counsel for Respondents

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LE BUP THI DAO, et al.,
Petitioners,

VS.

BOARD OF MEDICAL QUALITY ASSURANCE
OF THE STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

APPENDICES TO BRIEF FOR THE BOARD OF MEDICAL QUALITY ASSURANCE, et al. IN OPPOSITION

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

PAUL V. BISHOP
Deputy Attorney General
(Counsel of Record)

VIVIEN HARA HERSH
SUSAN K. MEADOWS
Deputy Attorneys General

DEPARTMENT OF JUSTICE
STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY
GENERAL
1515 "K" Street, Suite 511
Sacramento, CA 94244-2550
Telephone: (916) 324-5337

Counsel for Respondents

September 14, 1990

STATUTORY APPENDIX

I. The following are the full texts of the provisions of the California Business and Professions Code cited in this brief.

§ 2005. Division of licensing; responsibilities

The Division of Licensing shall have the responsibility for the following:

(a) Approving undergraduate and graduate medical education programs.

(b) Approving clinical clerkship and special programs and hospitals for such programs.

(c) Developing and administering the physician's and surgeon's licensure examination.

(d) Issuing licenses and certificates under the board's jurisdiction.

(e) Administering the board's continuing medical education program.

(f) Administering the student loan program.

(Added by Stats.1980, c. 1313, p. 4445, § 2.)

§ 2080. Application of article

(a) Except as otherwise provided, the provisions of this article applicable to applications generally shall apply to all certificates issued.

(b) Every applicant for a physician's and surgeon's certificate shall comply with the requirements of this article unless other specific requirements of this chapter are applicable to a particular class of applicant.

(Added by Stats.1980, c. 1313, p. 4454, § 2.)

§ 2081. Application blanks; verification

Each application shall be made upon a form provided by the Division of Licensing, and each application form shall contain a legal verification to be signed by the applicant verifying under penalty of perjury that the information provided by the applicant is true and correct and that any information in supporting documents provided by the applicant is true and correct.

(Added by Stats.1980, c. 1313, p. 4454, § 2. Amended by Stats.1986, c. 220, § 8, eff. June 30, 1986.)

§ 2082. Contents and attached documents

Each application shall include the following:

(a) A diploma issued by an approved medical school. The requirements of the school shall have been at the time of granting the diploma in no degree less than those required under this chapter or by any preceding medical practice act at the time that the diploma was granted. In lieu of a diploma, the applicant may submit evidence satisfactory to the Division of Licensing of having possessed the same.

(b) An official transcript or other official evidence satisfactory to the division showing each approved medical school in which a resident course of professional instruction was pursued covering the minimum requirements for certification as a physician and surgeon, and that a diploma and degree were granted by the school.

(c) Such other information concerning the professional instruction and preliminary education of the applicant as the division may require.

(d) An affidavit showing to the satisfaction of the division that the applicant is the person named in each diploma and transcript that he or she submits, that he or she is the lawful holder thereof, and that such diploma or transcript was procured in the regular course of professional instruction and examination without fraud or misrepresentation.

(Added by Stats.1980, c. 1313, p. 4454, § 2.)

§ 2083. Tender of fee; filing

Each application for a certificate shall be accompanied by the fee required by this chapter and shall be filed with the Division of Licensing.

(Added by Stats.1980, c. 1313, p. 4455, § 2. Amended by Stats.1987, c. 1368, § 1.)

§ 2084. Approval of schools

The Division of Licensing may approve every school which substantially complies with the requirements of this chapter for resident courses of professional instruction. Graduates of medical schools approved under this section shall be deemed to meet the requirements of Section 2089. Medical schools accredited by a national accrediting agency approved by the division and recognized by the United States Department of Education shall be deemed approved by the division under this section. Nothing in this chapter prohibits the division from considering the quality of the resident courses of professional instruction required for certification as a physician and surgeon.

(Added by Stats.1980, c. 1313, p. 4455, § 2. Amended by Stats.1985, c. 1176, § 2; Stats.1985, c. 1178, § 1.)

§ 2085. Graduates from special medical school programs of approved medical schools; failure to meet specified curriculum requirements; provisions for applicant approval; presumption

(a) Notwithstanding Section 2084, a graduate of an approved medical school located in the United States or Canada who has graduated from a special medical school program which does not substantially meet the requirements of Section 2089 with respect to any aspect of curriculum length or content may be approved by the division if the division determines that the applicant has otherwise received adequate instruction in the subjects listed in subdivision (b) of Section 2089. The division may require an applicant under this section to undertake additional education to bring up to standard, instruction in the subjects listed in subdivision (b) of Section 2089 as a condition of issuing a physician's and surgeon's certificate. In approving an applicant under this section, the division may take into account the applicant's total relevant academic experience, including performance on standardized national examinations.

(b)(1) Notwithstanding subdivision (a) or Sections 2084 and 2089, an applicant who is a graduate of an approved medical school located in the United States or Canada who has graduated from a special medical school program that does not substantially meet the requirements of Section 2089 with respect to any aspect of curriculum length or content shall be presumed to meet the requirements of Sections 2084 and 2089 if the special medical school program has been reviewed and approved by a national accrediting agency approved by the division and recognized by the United States Department of Education.

(2) This presumption may be overcome upon a finding by the division that the medical education received by the applicant is not the educational equivalent of the medical education received by graduates of medical schools approved pursuant to subdivision (a) or Section 2084. In making its finding, the division shall consider, at a minimum, the applicant's total academic and medical training experience prior to, and following, as well as during, medical school, the applicant's performance on standardized national examinations, including the National Board Examinations, the applicant's achievements as a house staff officer, and the number of years of postgraduate medical training completed by the applicant.

(3) An applicant under this subdivision who (A) has satisfactorily completed at least two years of postgraduate clinical training approved by the Accreditation Council for Graduate Medical Education or the Coordinating Council of Medical Education of the Canadian Medical Association and whose postgraduate training has included at least one year of clinical contact with patients and (B) has achieved a passing score in each subject area of the

written examination required for licensure, satisfies the requirements of Sections 2084 and 2089. For purposes of this subdivision, a passing score on a subject area in Part I of the written examination shall be a standard score of 380 or higher, and for a subject area in Part II of the examination, a standard score of 290 or higher. For purposes of this subdivision, an applicant who has satisfactorily completed at least two years of approved postgraduate clinical training on or before July 1, 1987, shall not be required to have at least one year of clinical contact with patients.

(4) An applicant who has not achieved a passing score in one or more subject areas of the written examination required for licensure may otherwise demonstrate to the satisfaction of the division that he or she possesses adequate skills, knowledge, and ability in the particular subject area or areas of the examination not passed.

(5) An applicant who has not achieved a passing score in one or more subject areas of the required examination may, at the discretion of the division, be allowed to remedy that deficiency by achieving a passing score in the pertinent subject area or areas through a reexamination administered under the auspices of the division, at the applicant's expense.

(6) Applicants under this subdivision who apply after satisfactorily completing one year of approved postgraduate training shall have their applications reviewed by the division and shall be informed by the division either that satisfactory completion of a second year of approved postgraduate training will result in their being deemed to meet the requirements of Sections 2084 and 2089, or informed of any deficiencies in their qualifications or documentation and the specific remediation, if any, required by the division to meet the requirements of Sections 2084 and 2089. Upon satisfactory completion of the specified remediation, the division shall promptly issue a license to the applicant.

(Added by Stats.1985, c. 1169, § 1; Stats.1985, c. 1176, § 3. Amended by Stats.1986, c. 1237, § 1, eff. Sept. 26, 1986; Stats.1987, c. 30, § 1, eff. May 28, 1987.)

§ 2086. Evaluation of curricula of medical schools; medical consultants and investigators

The Division of Licensing may utilize medical consultants and investigators employed by the board pursuant to Section 2020 to evaluate the curricula of medical schools. A medical consultant or investigator shall meet such reasonable standards of experience and education, to be determined by the division, as will enable him or her to competently perform such duties of evaluation.

(Added by Stats.1980, c. 1313, p. 4455, § 2.)

§ 2087. Court action in event of disapproval or rejection of applicant

If any medical school is not approved by the Division of Licensing or any applicant for examination is rejected by it, then the school or the applicant may commence an action in the superior court as provided in Section 2019 against the division to compel it to approve the school or to admit the applicant to examination or for any other appropriate relief. If the applicant is denied admittance to the examination or a certificate on the grounds of unprofessional conduct, the provisions of Article 12 (commencing with Section 2220) shall apply. In such an action the court shall proceed under Section 1094.5 of the Code of Civil Procedure, except that the court may not exercise an independent judgment on the evidence. The action shall be speedily determined by the court and shall take precedence over all matters pending therein except criminal cases, applications for injunction, or other matters to which special precedence may be given by law.

(Added by Stats.1980, c. 1313, p. 4455, § 2.)

§ 2088. Premedical educational requirements

Each applicant shall present an official transcript or other official evidence to the Division of Licensing that he or she has completed two years of preprofessional postsecondary education, or its equivalent, before completing the resident course of professional instruction.

The two-year preprofessional postsecondary education shall include the subjects of physics, chemistry, and biology. In the event that one of the above subjects was not completed as a part of that postsecondary education, an applicant shall complete a course of instruction in such subjects in an accredited postsecondary educational institution prior to taking the written examination for licensure.

(Added by Stats.1980, c. 1313, p. 4456, § 2.)

§ 2089. Medical training requirements

(a) Each applicant for a physician's and surgeon's certificate shall show by official transcript or other official evidence satisfactory to the Division of Licensing that he or she has successfully completed a medical curriculum extending over a period of at least four academic years, or 32 months of actual instruction, in a medical school or schools located in the United States or Canada approved by the division, or in a medical school or schools located outside the United States or Canada which otherwise meets the requirements of this section. The total number of hours of all courses shall consist of a

minimum of 4,000 hours. At least 80 percent of actual attendance shall be required. If an applicant has matriculated in more than one medical school, the applicant must have matriculated in the medical school awarding the degree of doctor of medicine or its equivalent for at least the last full academic year of medical education received prior to the granting of the degree.

(b) The curriculum for all applicants shall provide for adequate instruction in the following subjects:

Alcoholism and other chemical substance dependency, detection and treatment.

Anatomy, including embryology, histology, and neuroanatomy.

Anesthesia.

Biochemistry.

Child abuse detection and treatment.

Dermatology.

Geriatric medicine.

Human sexuality.

Medicine, including pediatrics.

Neurology.

Obstetrics and gynecology.

Ophthalmology.

Otolaryngology.

Pathology, bacteriology, and immunology.

Pharmacology.

Physical medicine.

Physiology.

Preventive medicine, including nutrition.

Psychiatry.

Radiology, including radiation safety.

Surgery, including orthopedic surgery.

Therapeutics.

Tropical medicine.

Urology.

(Added by Stats.1980, c. 1313, p. 4456, § 2. Amended by Stats.1984, c. 1149, § 2; Stats.1985, c. 1176, § 4.)

§ 2089.5. Clinical instruction; adequacy

(a) Clinical instruction in the subjects listed in subdivision (b) of Section 2089 shall meet the requirements of this section and shall be considered adequate if the requirements of subdivision (a) of Section 2089 and the requirements of this section are satisfied.

(b) Instruction in the clinical courses shall total a minimum of 72 weeks in length.

(c) Instruction in the core clinical courses of surgery, medicine, pediatrics, obstetrics and gynecology, and psychiatry shall total a minimum of 36 weeks in length with a minimum of eight weeks instruction in surgery, eight weeks in medicine, six weeks in pediatrics, six weeks in obstetrics and gynecology, and four weeks in psychiatry.

(d) Of the instruction required by subdivision (b), including all of the instruction required by subdivision (c), 54 weeks shall be performed in a hospital that sponsors the instruction and shall meet one of the following:

(1) Is a formal part of the medical school.

(2) Has an approved residency program in family practice or in the clinical area of the instruction for which credit is being sought.

(3) Is formally affiliated with an approved medical school located in the United States or Canada.

(4) Is formally affiliated with a medical school located outside the United States or Canada.

(e) If the institution, specified in subdivision (d), is formally affiliated with a medical school located outside the United States or Canada, it shall meet the following:

(1) The formal affiliation shall be documented by a written contract detailing the relationship between the medical school and hospital and the responsibilities of each.

(2) The school and hospital shall provide to the division a description of the clinical program. The description shall be in sufficient detail to enable the division to determine whether or not the program provides students an adequate medical education. The division shall approve the program if it determines that the program provides an adequate medical education. If the division does not approve the program, it shall provide its reasons for disapproval to the school and hospital in writing specifying its findings about each aspect of the program that it considers to be deficient and the changes required to obtain approval.

(3) The hospital, if located in the United States, shall be accredited by the Joint Commission on Accreditation of Hospitals, and if located in another country, shall be accredited in accordance with the law of that country.

(4) The clinical instruction shall be supervised by a full-time director of medical education, and the head of the department for each core clinical course shall hold a full-time faculty appointment of the medical school and shall be board certified or eligible, or have an equivalent credential in that specialty area appropriate to the country in which the hospital is located.

(5) The clinical instruction shall be conducted pursuant to a written program of instruction provided by the school.

(6) The school shall supervise the implementation of the program on a regular basis, documenting the level and extent of its supervision.

(7) The hospital-based faculty shall evaluate each student on a regular basis and shall document the completion of each aspect of the program for each student.

(8) The hospital shall ensure a minimum daily census adequate to meet the instructional needs of the number of students enrolled in each course area of clinical instruction, but not less than 15 patients in each course area of clinical instruction.

(9) The division, in reviewing the application of a foreign medical graduate, may require the applicant to submit a description of the clinical program, if the division has not previously approved the program, and may require the applicant to submit documentation to demonstrate that the applicant's clinical training met the requirements of this subdivision.

(10) The medical school shall bear the reasonable cost of any site inspection by the division or its agents necessary to determine whether the clinical program offered is in compliance with this subdivision.

(Added by Stats.1985, c. 1176, § 4.5; Stats.1985, c. 1178, § 2. Amended by Stats.1989, c. 506, § 1.)

§ 2122. Faculty-in-exile committee; university of Saigon, Vietnam, medical school admittees; licensure; duration of section

(a) The board shall appoint a six-member Faculty-in-Exile Committee, consisting of five former faculty members of the University of Saigon, Vietnam, Medical School, and one member of the Division of Licensing. The board shall appoint the members of the committee no later than February 1, 1988.

(b) The committee shall review the application files of applicants who were admitted to the University of Saigon, Vietnam, Medical School before 1975, and who completed their education during the years 1975 to 1980, inclusive, to evaluate their eligibility and make recommendations for licensure as a physician and surgeon. The committee shall consider those applications on a timely basis, not to exceed 60 days.

(c) The committee shall make recommendations to the Division of Licensing and the division shall consider each recommendation and make a finding within 90 days after receipt of that recommendation. The division shall accept the recommendation of the committee, unless the division finds, after notice and opportunity for hearing, that the committee's recommendation is not based upon substantial evidence.

This section shall be operative until January 1, 1992, and on that date is repealed, unless a later enacted statute, which becomes effective on or before January 1, 1992, deletes or extends that date.

(Added by Stats.1987, c. 1382, § 2.)

II. The following are the full texts of the provisions of the Code of Civil Procedure cited in this brief.

§ 437c. Grounds for and effect of summary judgment; procedure on motion

(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at such earlier time after the general appearance as the court, with or without notice and upon good cause shown, may direct. Notice of the motion and supporting papers shall be served on all other parties to the action at least 28 days before the time appointed for hearing. However, if the notice is served by mail, the required 28-day period of notice shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion.

Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial

notice shall or may be taken. The opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts which the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

Any reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

Evidentiary objections not made either in writing or orally at the hearing shall be deemed waived.

The provisions of Section 1005 and the provisions of subdivision (a) of Section 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(e) If a party is otherwise entitled to a summary judgment pursuant to the provisions of this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f) A party may move for summary adjudication of issues, either by itself or as an alternative to summary judgment. If it appears that the proof supports the granting of the motion for summary adjudication as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that those issues are without substantial controversy. Moreover, upon a motion for summary adjudication, the court shall, by written order or oral order recorded verbatim, specify those issues raised by the motion for summary adjudication as to which there exists a material, triable controversy, and shall specifically refer to the evidence which establishes a triable issue of fact regarding each of those issues. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

(g) Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.

(i) If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court shall order the party presenting the affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur. Sanctions shall not be imposed pursuant to this subdivision except on notice contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be heard.

(j) Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding herein provided for.

(k) In actions which arise out of an injury to the person or to property, when a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

(*l*) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of any order pursuant to this section except the entry of summary judgment, a party may, within 20 days after service upon him or her of a written notice of entry of the order, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the initial period within which to file the petition shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. The superior court may, for good cause, and prior to the expiration of the initial period, extend the time for one additional period not to exceed 10 days.

(m) Nothing in this section shall be construed to extend the period for trial provided by Section 1170.5.

(n) The provisions of subdivisions (a) and (b) shall not apply to actions brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3. *(Added by Stats.1973, c. 366, § 2. Amended by Stats.1976, c. 675, § 1; Stats.1978, c. 949, § 2; Stats.1980, c. 57, § 1; Stats.1982, c. 1510, § 1; Stats.1983, c. 490, § 1; Stats. 1984, c. 171, § 1; Stats.1986, c. 540, § 3; Stats.1989, c. 1416, § 16.)*

III. The following are the full texts of the provisons of Title 42 of the United States Code cited in this brief.

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284.

§ 1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to ter, by force, intimidation, or threat, any party or witness in any urt of the United States from attending such court, or from testiing to any matter pending therein, freely, fully, and truthfully, or injure such party or witness in his person or property on account his having so attended or testified, or to influence the verdict, prentment, or indictment of any grand or petit juror in any such court, to injure such juror in his person or property on account of any verct, presentment, or indictment lawfully assented to by him, or of his ing or having been such juror; or if two or more persons conspire the purpose of impeding, hindering, obstructing, or defeating, in y manner, the due course of justice in any State or Territory, with tent to deny to any citizen the equal protection of the laws, or to inre him or his property for lawfully enforcing, or attempting to enrce, the right of any person, or class of persons, to the equal protecn of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or in disguise on the highway or on the premises of another, for the rpose of depriving, either directly or indirectly, any person or ss of persons of the equal protection of the laws, or of equal privies and immunities under the laws; or for the purpose of preventg or hindering the constituted authorities of any State or Territory om giving or securing to all persons within such State or Territory e equal protection of the laws; or if two or more persons conspire prevent by force, intimidation, or threat, any citizen who is lawfully titled to vote, from giving his support or advocacy in a legal manner, ward or in favor of the election of any lawfully qualified person as elector for President or Vice President, or as a Member of Congress the United States; or to injure any citizen in person or property account of such support or advocacy; in any case of conspiracy set rth in this section, if one or more persons engaged therein do, or use to be done, any act in furtherance of the object of such conspiracy, hereby another is injured in his person or property, or deprived or ving and exercising any right or privilege of a citizen of the United tates, the party so injured or deprived may have an action for the revery of damages occasioned by such injury or deprivation, against y one or more of the conspirators.

.S. § 1980.

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

R.S. § 1981.

APPENDICE A

First Order Re: Defendants' Motion for Summary Judgment and Alternative Motion for Summary Adjudication

Order Re: Summary Adjudication of Issues

James R. Wheaton
Robert C. Fellmeth
Julianne B. D'Angelo
CENTER FOR PUBLIC INTEREST LAW
1535 Mission Street
San Francisco, CA 94103
415/431-7430

Jerel McCrary
Of Counsel

Attorneys for Plaintiffs

FILED
San Francisco County Superior Court
MAY 29 1989
DONALD M. DICKINSON, Clerk
BY _____ Deputy Clerk

7 1989

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

DR. LE BUP THI DAO, et al., Plaintiffs, vs. BOARD OF MEDICAL QUALITY ASSURANCE, et al., Defendants.	No. 876321 FIRST ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION

Defendants' motion for summary judgment and alternative motion for summary adjudication of issues came on for hearing on May 8, 1989, and on continued hearing May 11, 1989. Deputy Attorney General Paul Bishop appeared for defendants, James Wheaton and Jerel McCrary appeared for plaintiffs. Having read and considered the papers filed and lodged herein, and considered the arguments and oral and documentary evidence, the following matters are stipulated between all parties, and IT IS ORDERED:

1. The following portions of the First Amended Complaint on file in this action are dismissed:

a. Defendants Board of Medical Quality Assurance, Division of Licensing, Credentials Committee and Department of Consumer Affairs are dismissed from the Fourth Cause of Action, as they are not "persons" under 42 U.S.C. section 1983;

b. Defendants Board of Medical Quality Assurance, Division of Licensing, Credentials Committee and Department of Consumer Affairs are dismissed from the Fifth Cause of Action, as they are not "persons" under 42 U.S.C. section 1985;

c. Defendants Board of Medical Quality Assurance, Division of Licensing, Credentials Committee and Department of Consumer Affairs are dismissed from the Sixth Cause of Action, as they are not "persons" under 42 U.S.C. section 1986;

2. Plaintiffs Drs. Le Bup Dao, Tao Nguyen, Richard Le and Sang Van Tran are no longer seeking declaratory or injunctive relief in this action.

3. Plaintiffs' failure to file any claim with the State bars any monetary relief against any defendant for any cause of action that is based on state law.

4. The Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States is not entitled to any monetary relief for itself or in behalf of any other person. The declaratory and injunctive relief sought by plaintiff Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States is limited to the following, because of the passage of S.B. 1358 in 1987, codified at Business and Professions Code section 2122:

a. compliance by defendants with the Administrative Procedure Act, Government Code section 11340 et seq., in adopting and applying rules of general application regarding applications for licensure from Vietnamese refugees;

b. compliance by defendants with the Bagley-Keene Open Meetings Act, Government Code section 11120 et seq., in their conduct of meeting of the Division of Licensing and its committees during 1986 and 1987, with regard to the licensing of applicants who are refugees from Vietnam;

c. defendants' current and future compliance with the Administrative Procedure Act, Government Code section 11340 et seq., in adopting and applying rules of general application regarding applications for licensure from Vietnamese refugees;

d. defendants' current and future compliance with the Bagley-Keene Open Meetings Act, Government Code section 11120 et seq., in their conduct of meetings of the Division of Licensing and its committees, with regard to the licensing of applicants who are refugees from Vietnam.

In so ruling, the Court expresses no opinion on any challenge or defense to such declaratory and injunctive relief on the grounds of mootness, irrelevancy or other grounds.

3. In all other respects defendants' motion is taken under submission.

Approved as to form.

Weiss Hawk Hanke for Paul V. Bishop
Attorneys for Defendants

Dated: 5/18/89

Judge of the Superior Court

FILED
MAY 19 1989
DONALD W. DICKINSON, Clerk
BY

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

DR. LE BUP THI DAO, et al., Plaintiffs, vs. BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al., Defendants.	NO. 876 321 ORDER RE SUMMARY ADJUDICATION OF ISSUES

Defendants' Motion for Summary Judgment and for Attorneys' Fees under 42 U.S.C. section 1988, or in the Alternative Summary Adjudication of the Issues, as subsequently limited and restated, is ruled upon as follows.

Insofar as the motion requests an adjudication that the institutional (or "organizational") defendants are entitled to sovereign immunity from suit under 42 U.S.C. section 1981, the motion is DENIED. There admittedly is a split of authority as to whether state agencies are immune from suit under section 1981. Compare, e.g., Yarbrough v. Illinois Dept. of Mental Health (N.D. Ill. 1982), 538 F.Supp. 414, with

Malone v. Schenk (C.D. Ill. 1985), 638 F.Supp. 423. Yarbrough and Skyers v. Port Authority of N.Y. And N.J. (S.D.N.Y. 1976), 431 F.Supp. 79, 83, on which it relied, recognize that whether Congress intended to override state immunity under the Eleventh Amendment (which Congress is authorized to do by both the Thirteenth and Fourteenth Amendments) must be evaluated separately for section 1981, which was adopted as part of the Civil Rights Act 1866 under the authority of the Thirteenth Amendment, and for section 1983, which was adopted as part of the Ku Klux Klan Act of 1871 under the Authority of the Fourteenth Amendment. Both cases concluded that section 1981 was intended to encompass state agencies as "persons" subject to judicial enforcement of its provisions. The court in Malone agreed that the legislative history of section 1981 indicated "that Congress fully intended to reach the governmental acts of the states with the Civil Rights Act of 1866," 638 F.Supp. at 428, but felt that under Atascadero State Hospital v. Scanlon (1985), 473 U.S. 234, state immunity exists unless "the statutue in its language unmistakenly abrogate(s) the state's Eleventh Amendment immunity," ibid., and that the decisions in Yarbrough and Skyers had been "implicitly disapproved by the holding in Atascadero." id. at 429. However, Atascadero held only that section 504 of the Rehabilitation Act of 1973 was not intended to override Eleventh Amendment immunity; it did not purport to modify the basic principle that the meaning of each federal statutue must be determined separately and that properly evidenced Congressional intent may be considered in determining

the meaning of the words of the statute. Since Malone itself recognized the apparent intention of Congress to apply section 1981 to the states, it would seem that Yarbrough and Skyers reached the correct conclusion that the statute overrides the state's immunity. Compare Chavez-Salido v. Cabell (C.D. Calif. 1977), 427 F.Supp. 158, 162-165; Sethy v. Alameda Co. Water Dist. (9th Cir. 1976), 545 F.2d 1157, 1159-1160; Mahone v. Waddle (3rd Cir. 1977), 564 F.2d 1018, 1030-1037. In all events, since the single California appellate decision addressing this issue has stated that state agencies are subject to suit under section 1981, Filipino Accountants' Assn. v. State Board of Accountancy (1984), 155 Cal.App.3d 1023, 1035 n. 12, that is the view which this court should follow.

Whether the evidence is sufficient to support the cause of action under section 1981 against the organizational defendants is not an issue which has been properly presented by the pending motion.

Insofar as the motion requests an adjudication that the individual defendants are entitled to immunity from the various claims that have been asserted against them, the motion will be GRANTED. There is authority that arguably supports the conclusion that the individual defendants are entitled to absolute immunity from liability for their respective roles in refusing to accept for the purpose of licensure the adequacy of the curriculum at the University of Saigon Medical School after 1975, and for delaying the issuance to plaintiffs of licenses to practice medicine in California. See, e.g.,

Horwitz v. Board of Medical Examiners of State of Colorado (10th Cir. 1987), 822 F.2d 1508; Vakas v. Rodriguez (10th Cir. 1984), 728 F.2d 1293; Greene v. Zank (1984), 158 Cal.App.3d 497. However, the uncontroverted facts fail to establish that the functions performed by defendants were sufficiently judicial in nature to warrant quasi-judical absolute immunity. See, e.g., Cleavinger v. Saxner (1985), 474 U.S. 193; Schlegal v. Rebout (9th Cir. 1987), 841 F.2d 937, 941-944. Neither has a basis for quasi-legislative absolute immunity been established.

Nonetheless, the uncontroverted facts do establish the right to qualified immunity. The defendants' actions in insisting upon additional verification of the adequacy of the curriculum at the University of Saigon Medical School, as described in the voluminous declarations and deposition transcripts without material contradiction (as distinguished from the manner in which those actions are characterized in the legal argument of counsel) must "reasonably be thought consistent with the rights" defendants are alleged to have violated. Anderson v. Creighton (1987), ___ U.S. ___, 107A S.Ct. 3034, 3038. The defendants are shielded from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald (1982), 457 U.S. 800, 818; Little v. City of Seattle (9th Cir. 1988), 863 F.2d 681. There simply is no basis to conclude that the defendants did not believe and could not reasonably have believed they were acting properly in demanding

confirmation of the post-1975 Saigon curriculum as they did.

With respect to the claim that defendants violated plaintiffs' constitutional rights and 42 U.S.C. section 1981 by basing their actions upon impermissible racial or ethnic factors, qualified immunity is not established unless this allegation has been negated. Guitierrez v. Municipal Court of S.E. Judicial Dist. (9th Cir. 1988), 838 F.2d 1031, 1049-1051 vacated as moot, 57 U.S.L.W. 3687 (1989). However, the declarations of the moving parties do negate this allegation, and the opposing evidence cited by the plaintiffs is not sufficient to raise a triable issue of fact concerning this material issue. (See, e.g., Plaintiffs' Response to Defendants' Statement of Undisputed Facts, response to Defendants' Fact #31-32.)

While it may be that the refusal of the defendants to have granted plaintiffs licenses before the recent statutory amendments was unjustifiable, judicial remedies were available to have corrected any possible abuses of discretion. Assuming, arguendo, that there were such abuses and that they affected plaintiffs' constitutional rights, it does not follow that the individual board members and staff bear personal liability. The defendants' evidence does reflect facts establishing the existence of a qualified immunity as a matter of law, and, however sympathetic one may be with the predicament in which the plaintiffs found themselves, plaintiffs' evidence fails to create a triable issue concerning those facts.

Insofar as the defendants' motion requests an adjudication that the Committee for the Professional Rights of

Vietnamese Refugee Physicians in the United States lacks standing to seek declaratory and injunctive relief herein, the motion is DENIED. The moving papers fail to establish that this alleged unincorporated association (First Amended Complaint of Course paragraph 6(b)) lacks standing.

No other issue has been properly presented for summary adjudication.

DATED: May 19, 1989.

STUART R. POLLAK
Judge of the Superior Court

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER EIGHT

DR. LE BUP THI DAO, et al.,

Plaintiffs,

vs.

BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al.,

Defendants.

NO. 876 321

CERTIFICATE OF SERVICE BY MAIL (CCP 1013a(3))

I, H. WRIN, Deputy County Clerk and Deputy Clerk of the Superior Court of the City and County of San Francisco, certify that I am not a party to the within action; That I served a copy of the attached

ORDER RE SUMMARY ADJUDICATION OF ISSUES

by placing said copy in an envelope addressed to the following:

James R. Wheaton, Esquire
Center for Public Interest Law
1535 Mission Street
San Francisco, CA 94103

Paul V. Bishop
Deputy Attorney General
JOHN K. VAN DE KAMP, Attorney General
of the State of California
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550

which envelope was then sealed and postage fully prepaid thereon, and thereafter was on MAY 19 1989, deposited in the United States mail at San Francisco, California.

DATED: MAY 19 1989

H. WRIN

F1255A

APPENDICE B

Court of Appeal Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

LE BUP THI DAO et al.,

Real Parties in Interest.

A046101

(San Francisco Super. Ct. No. 876321)

LE BUP THI DAO et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Real Parties in Interest.

A046132

(San Francisco Super. Ct. No. 876321)

A class action challenging alleged discriminatory licensing practices of the Board of Medical Quality Assurance (BMQA) has produced these petitions demonstrating that virtually

everyone involved objects to some aspect of a pair of orders made by respondent court in connection with a motion for summary judgment.[1] For the reasons hereinafter developed, we determine that only one group of parties has some entitlement to relief.

BACKGROUND

The underlying action was initiated by four Vietnamese graduates of the University of Saigon Medical School, joined by the Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States (the Committee).[2] The named defendants were the BMQA, its Division of Licensing and its Credentials Commictee; the Department of Consumer Affairs as "the duly organized and constituted parent agency of BMQA"; and various individuals who occupy official positions with these entities.

---

1. In light of the multiplicity of petitioners and real parties in interest, the parties' trial court designations as plaintiffs and defendants will in the interests of simplicity and clarity be employed throughout this opinion.

2. With respect to the Committee the complaint alleges it "is an unincorporated association headquartered in Orange County, California. The Committee has filed for incorporation as a non-profit corporation under the laws of the State of California and the matter is pending. The Committee has a dues paying membership of approximately 100 Vietnamese refugees. Said membership is composed of licensed physicians and applicants for medical licensure throughout the United States. The [C]ommittee's organizational purpose is to ensure that its members are provided full and equal access to professional training, employment and licensure in the medical field."

An additional named plaintiff, Catholic Community Services, was dropped as a party plaintiff prior to the summary judgment motion.

The introductory allegations of the complaint provide an overview: "This action is a class action on behalf of foreign medical school graduates from Vietnam ("FMGs") who have been unlawfully denied a license to practice their profession in California by the discriminatory, illegal, arbitrary and unfounded actions of . . . (BMQA) and certain of its members and employees. . . . [¶] BMQA has been and remains engaged in acts and practices to artificially and invidiously deprive large numbers of FMG applicants of a California medical license without regard to competency standards and for anti-competitive, discriminatory and other improper purposes. These acts, many of which are unlawful in and of themselves, include the conduct of secret meetings with agents of the California[] Medical Association and others, discriminatory use of statutory criteria for licensure, falsifying minutes of meetings and other official documents, fabrication of nonexistent criteria for licensure, failure and refusal to follow statutory mandates, avoidance of required administrative procedures, unfounded charges against applicants and refusal to deal fairly and forthrightly with applicants." More particularly, plaintiffs alleged that (1) "defendants at a closed meeting on January 30-31, 1986 decided to suspend processing of all applications for licensure from persons who graduated from Vietnamese medical schools before or after 1975," and (2) at a meeting conducted on June 25-26, 1987, "defendants announced that no post-1975 Vietnamese graduate would receive a license" until such persons "fulfill[ed] new requirements for licensure," thereby

"violat[ing] both the California Administrative Procedure Act and the California Open Meeting Law."

Based upon these general allegations, and additional allegations detailing the treatment the four individual plaintiffs received from defendants, plaintiffs set forth causes of action seeking (1) damages and injunctive relief for violation of the Fourteenth Amendment's guarantees of equal protection and due process (2) damages for violation of 42 U.S.C. section 1981 (3) damages for violation of 42 U.S.C. section 1983 (4) damages for violation of 42 U.S.C. section 1985 (5) damages for violation of 42 U.S.C. section 1986 (6) damages for violation of the Administrative Procedure Act (Gov. Code, § 11340 et seq.) and (7) declaratory and injunctive relief for violation of the Open Government Act (Gov. Code, § 11120 et seq.). The substantive portion of the complaint concluded with an omnibus cause of action for declaratory and injunctive relief based upon all matters "hereinbefore alleged."[3]

In due course defendants moved for summary judgment or summary adjudication of issues. The grounds for the motion relevant to these proceedings were that (1) "Plaintiff Committee has no standing to assert the constitutional rights of the individual plaintiffs" (2) "Certain issues and claims in this

---

3. Additional causes of action seeking damages for violation of the Unruh Civil Rights Act (Civ. Code, § 51) and the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.) were subsequently dismissed by plaintiffs.

matter are now moot" and (3) "By reason of immunity, defendants are not liable for suit for violation of 42 U.S.C. sections 1981, 1983, 1985 or 1986." As part of their motion defendants also sought an award of costs, including attorneys fees, pursuant to 42 U.S.C. section 1988.

After receiving voluminous papers, prodding the parties into narrowing the areas of dispute by stipulation, and conducting two hearings on the motion, respondent court made two orders (both filed on May 19, 1989) in which it ruled that (1) pursuant to stipulation plaintiffs' claims based upon 42 U.S.C. section 1983, 1985, and 1986, were dismissed as against the institutional defendants (2) by reason of a split of authority the institutional defendants were not entitled to summary judgment on the claim based upon 42 U.S.C. section 1981 (3) the individual defendants were clothed with "qualified immunity" against all of plaintiffs' claims (4) the Committee had standing but only to pursue claims for declaratory and injunctive relief, not damages, by reason of the enactment of Business and Professions Code section 2122, and (5) "[n]o other issue has been properly presented for summary adjudication."

Unhappy with these determinations, plaintiffs and defendants each filed a petition for extraordinary mandamus relief. Alternative writs were issued.

REVIEW

Our usual practice in dealing with situations where both

sides are unhappy with trial court rulings, orders, or judgments is to deal with the points raised by one side before progressing to the points urged by the other side. With these petitions, however, we have determined that the most logical analytical progression requires some interlineation of the contentions advanced by the parties.

I

We first turn to defendants' petition (AO46101). Respondent court ruled, and plaintiffs do not dispute, that the state agencies named in the complaint have immunity from suit for purposes of 42 U.S.C. sections 1983, 1985, and 1986. The ruling that comparable immunity did not extend to section 1981 was correct. (See Filipino Accountants' Assn. v. State Bd. of Accountancy (1984) 155 Cal.App.3d 1023, 1035, fn. 12.) Defendants' elaborate arguments to the contrary are not persuasive because they are founded on considerations derived from application of the Eleventh Amendment to actions commenced in federal court. But the Eleventh Amendment does not apply to actions brought in state courts. (See Will v. Michigan Dept. of State Police (1989) ___ U.S. ___ (109 S.Ct. 2304, 2307).)

Yet although defendants may have lost this battle, plaintiffs cannot win the war. Plaintiffs invoked section 1981 solely in connection with one of their claims for damages alleged in their complaint. Less than a year ago the United States

Supreme Court held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." (Jett v. Dallas Independent School Dist. (1989) ___ U.S. ___ (109 S.Ct. 2702, 2721-2722).)[4] A further difficulty is that section 1983 does not apply to claims against a State. (Will v. Michigan Dept. of State Police, supra, at pp. ___ [109 S.Ct. 2304 at pp. 2307-2308, 2312]; see Pyne v. Meese (1985) 172 Cal.App.3d 292, 401-403.) What defendants choose to do with these recent holdings--which were issued after respondent court made its ruling--is up to them. All we can say at present is that no error occurred when the immunity claim by the institutional defendants was rejected.

II

In their petition (AO46132) plaintiffs ask us to overturn the determination by respondent court that the individual defendants enjoy immunity from plaintiffs' damage claims. To continue the theme developed in part I, that determination has

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4. Plaintiffs are correct in noting that the lead opinion in Jett was only a plurality opinion signed by four Justices. But while that opinion may fall short of an iron-clad holding, Justice Scalia (who filed a separate opinion "concurring in part and concurring in the judgment") disagreed with the plurality only on a point of methodology. As a matter of practical reality, the Jett plurality opinion represents the majority viewpoint of the Court. In any event, and however imperfectly expressed, we think that the Jett plurality trumps all of the lower court authorities to the contrary relied upon by plaintiffs.

been vindicated by recent related developments from the United States Supreme Court.

Insofar as respondent court's determination found against plaintiffs on their claim based upon 42 U.S.C section 1983, that ruling is invulnerable for a reason which could not be anticipated by either the court or the parties. In Will v. Michigan Dept. of State Police, supra, ___ U.S. ___ (109 S.Ct. 2304 at pp. 2311-2312), the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" and therefore cannot face liability for damages. Lesser federal courts have reached the same conclusion with respect to sections 1985 and 1986. (See Coffin v. South Carolina Dept. of Social Services (D.S.C. 1983) 562 F.Supp. 579, 585-586 and authorities cited.)

Defendants submitted considerable, uncontradicted evidence in support of their claim that an undisputed material fact was that the "Individual defendants . . . were at all times material to this matter state officials acting in their official capacities under color of State Law." Those defendants can therefore face no liability for monetary damages as to sections 1983, 1985, and 1986.

There remains only plaintiff's cause of action based on section 1981. We believe this particular aspect of the controversy has become moot. If it is assumed that respondent court's ruling was erroneous because it took insufficient account of the factor of the individual defendants' unlawful motive for

their actions (see Gutierrez v. Mun. Ct. of S.E. Judicial Dist. (9th Cir. 1988) 838 F.2d 1031, 1049-1051), plaintiffs will be unable to recover the damages they seek. As previously established, damages for a violation of section 1981 can be had only pursuant to section 1983 (Jett v. Dallas Independent School Dist., supra, ___ U.S. ___ (109 S.Ct. 2702 at pp. 2721-2722), but the individual defendants have immunity against the section 1983 claims because they were acting solely in their official capacities. (Will v. Michigan Dept. of State Police, supra, ___ U.S. ___ [109 S.Ct. 2304 at pp. 2311-2312].) In these circumstances mootness is established because no effectual relief could be granted. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 517, p. 499.)

III

The preceding discussion has resolved the issues of plaintiffs' damage claims, and has answered the sole contention of error pressed by plaintiffs. We next address arguments by defendants regarding whether plaintiffs' claims for declaratory and injunctive relief are moot.

Pursuant to a stipulation between the parties, one of the orders filed by respondent court specified that the individual plaintiffs "are no longer seeking declaratory or injunctive relief."[5] Plaintiffs do not dispute this ruling. There

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5. The parties stipulated, and respondent court ordered, that the Committee "is not entitled to any monetary relief for itself or in [sic: on] behalf of any other person."

consequently seems no point to considering mootness as to those plaintiffs.

Respondent court rejected defendants' claim that the Committee had no standing to seek any kind of relief, but the court's orders restricted the Committee's standing to certain specific aspects of the declaratory and injunctive relief claims regarding the alleged violations of the Administrative Procedure and Open Meeting Acts. Defendants assert that the Committee lacks standing, thus mooting all claims for declaratory and injunctive relief. It has been the practice of this court to decide questions of organizational standing only with the benefit of a full record that provides some concrete basis for evaluating inanimate entities. (See McKeon v. Hastings College (1986) 185 Cal.App.3d 877, 892-893; cf. Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal.App.3d 105.) The soundness of this approach, which implicitly treats the issue as one of fact, appears pertinent here, given that (insofar as can be determined from the limited record presented to us) defendants submitted nothing in the way of supporting evidence required by Code of Civil Procedure section 437c, subdivision (b). As respondent court put it: "The moving papers fail to establish that this alleged unincorporated association . . . lacks standing." Accordingly, we do not believe there is an adequate basis for our deciding as a matter of law that respondent court erred in not terminating the equitable relief aspects of this litigation.

Defendants present a contention which, on paper,

constitute a persuasive argument that the remaining issues of equitable relief have been rendered moot by the enactment of Business and Professions Code section 2122.[6] Respondent court did not address this issue. Its reasons for doing so are unclear. In the first of the May 19th orders the court took pains to make clear that it was expressing "no opinion on any challenge or defense to such declaratory and injunctive relief on the grounds of mootness, irrelevancy or other grounds." In the second of the orders the court stated: "No other issue has been properly presented for summary judgment."

The summary judgment statute seems quite clear about the granting or denial of a motion for summary judgment. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The grounds for denying the motion are

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6. The effect of this statute, which figured prominently in the parties' stipulation which underlay one of the May 19th orders, deserves some explanation.

One of the major points of plaintiffs' complaint was that defendants had refused to follow usual practice by appointing a Faculty Committee in Exile, composed of former faculty members of the University of Saigon Medical School, which would evaluate and make recommendations concerning licensing of persons claiming to be graduates of that school. Section 2122 mandated the creation of such a committee for this purpose and directs that the BMQA licensing division "shall accept the recommendation of the committee, unless the division finds, after notice and opportunity for hearing, that the committee's recommendation is not based upon substantial evidence." (Bus. & Prof. Code, § 2122, subd. (c).) The committee's members were to have been appointed by February 1, 1988. (Id., subd. (a).) Section 2122 contains an automatic repeal provision for January 1, 1992. (Id., subd. (d).)

clear: (1) the existence of "a triable issue as to one or more material facts" (id., subd. (g)); (2) the moving party's failure to comply with the requirement of "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed . . . [with] reference to the supporting evidence" (id., subd. (b)); (3) "in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof" (id., subd. (e)); or (4) "[i]f it appears from the affidavits submitted in opposition . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" (id., subd. (h)).

Following the lead of Division Two, this court has held that "[a] trial court may not refuse to hear a summary judgment motion filed within the time limits of section 437c." (Sentry Ins. Co. v. Superior Court (1989) 207 Cal.App.3d 526, 529; see Wells Fargo Bank v. Superior Court (1988) 206 Cal.App.3d 918.) A logical corollary of this principle is that a trial court must rule on all aspects of a motion for summary judgment or summary adjudication unless there is ground specified in section 437c for withholding a decision. A trial court is not allowed the luxury of not deciding or of not expressing its opinion, as did respondent court, concerning a matter brought forward in

conformity with statutory procedures. It appears from a fair reading of section 437c that a trial court is not permitted to retreat into enigmatic silence or opaque remarks. According to subdivision (g): "Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order." (Emphasis added.)

Respondent court may well have had a valid reason for denying defendants' motion as to this point. Unfortunately, if such a reason exists it is not discernible from the record before us. As the cause will have to be returned to respondent court for entry of a new order, the situation may be clarified at that time.

IV

Defendants' final contention is that respondent court "abused its discretion in refusing to rule" on their application for attorneys' fees pursuant to 42 U.S.C. section 1988. The preceding discussion concerning the flaw in the ruling on

defendants' arguments relative to plaintiffs' equitable relief claims is equally applicable to this contention.

In A046101 a peremptory writ of mandate will issue directing respondent court to vacate its orders of May 19, 1988, and enter a new order in conformity with this opinion.

In A046132 the petition for a peremptory writ is denied and the alternative writ is discharged.

Poché, Acting P.J.

WE CONCUR:

Channell, J.

Perley, J.

Bd. of Medical Quality Assurance
v. Superior Court
A046101

Le Bup Thi Dao v. Superior Court
A046132

APPENDICE C

Plaintiffs' Response to Defendants' Statement of Undisputed Facts: Defendants' Fact No. 24

JAMES R. WHEATON
ROBERT C. FELLMETH
JULIANNE B. D'ANGELO
Center for Public Interest Law
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

JEREL McCRARY
Of Counsel

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

DR. LE BUP THI DAO, et al., Plaintiffs, v. BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al., Defendants.	No. 876 321 PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS Trial: June 5, 1989

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DEFENDANTS' FACT #24

Individual defendants Kenneth Wagstaff, Dr. Galal S. Gough, Dr. Lindy Kumagai, Dr. John Lungren, Dr. James Magnall, Raymond Mallel, Audrey Melikiin [sic], Dr. J. Alfred Rider and Dr. Jerome Unatin were at all times material to this matter state officials acting in their official capacities under color of State Law.

PLAINTIFFS' COUNTERFACTS AND EVIDENCE

UNDISPUTED AND IRRELEVANT.

See Memorandum of Points and Authorities served and filed herewith on the legal impact of "acting...under the color of State Law."

(3)

No. 90-303

Supreme Court, U.S.
FILED
SEP 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

LE BUP THI DAO, et al.,

Petitioners,

v.

BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

PETITIONERS' REPLY MEMORANDUM

ROBERT FELLMETH
Center for Public Interest Law
UNIVERSITY OF SAN DIEGO
Alcala Park
San Diego, CA 92110
(619) 260-4806
Counsel of Record

CARL K. OSHIRO
JULIE D'ANGELO
Center for Public Interest Law
1160 Battery Street
Suite 340
San Francisco, CA 94111
(415) 544-8832
Counsel for Petitioners

September 24, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. Contrary to respondents' claims, there is a pressing need to clarify the Court's recent holding in *Will*.

In their opposition, respondents argue against granting certiorari asserting that "there was no evidence that the individual defendants herein had acted with racial animus when the delays in licensure occurred." Respondents' Brief in Opposition at p. 18, hereafter referred to as "Respondents' Opposition". In fact, as discussed in the Petition for Writ of Certiorari at pages 7 through 9, there is a substantial amount of evidence which shows that respondents suspended the licensing of Vietnamese physicians based on their belief that all physicians trained in Vietnam were "communists," "trained by communists", or, for some unknown reason, categorically unfit to practice medicine in California.[1]

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[1] For example, the evidence in the record below shows that respondent Galal Gough (President of the Board of Medical Quality Assurance and one of the individual defendants in this action) was "very suspicious" of Vietnamese doctors. Grimm Deposition at pp. 133 and 261. Respondent Gough believed that all Vietnamese doctors after the fall of Vietnam were "members of the Communist party" or "trained by communists" and warned that "their training could not be trusted." Declaration of Senator Ed Royce at p. 2 and Gough Deposition at p. 96.

There also is evidence that respondents sought to deny licenses to Vietnamese doctors even when there was no legitimate reason to do so. When respondent J. Alfred Rider (President of the Division of Licensing and another of the individual defendants in this action) was asked by his staff whether Vietnamese doctors would be licensed if an investigation

(Continued on following page)

The facts in this case present a compelling case of invidious discrimination similar to that condemned by then-Circuit Judge Anthony Kennedy in *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980), *cert. denied* 449 U.S. 875. Just as city officials, in *Flores*, delayed the issuance of liquor licenses to Hispanic applicants, respondents, here, blocked the licensure of Vietnamese physicians for over two years. Just as city officials, in *Flores*, harbored negative, stereotypical views concerning Hispanic applicants, respondents, here, considered all Vietnamese applicants, "communists," "trained by communists," and unfit to practice medicine in California. Just as the Hispanic applicants, in *Flores*, were entitled to present the facts to a jury and obtain damages for invidious discrimination, the Vietnamese physicians, here, should be allowed the opportunity to go to trial and obtain appropriate relief.

(Continued from previous page)

cleared every credentials and training question, he answered "NO" following which the matter was dropped without dissent from the other members. Grimm Deposition at pp. 294-295.

The evidence also shows that while respondents Galal and Rider were blocking the licensure of Vietnamese physicians, they were taking extraordinary steps to license less qualified, non-Vietnamese applicants. Respondents' unfair and discriminatory efforts were objected to by the staff and the Attorney General, but to no avail. For citations to the record, see Petition for Writ of Certiorari, pp. 9-11, fn. 6-8.

Much of this evidence is in the form of sworn testimony from respondents themselves and from Marc Grimm, the chief staff person assigned to the Vietnamese matter. Over time, Mr. Grimm became so disgusted with respondents' exclusion of the Vietnamese applicants that he agreed to extensive depositions concerning the subject. In their Opposition, respondents have made no effort to refute or even explain the specific facts presented by petitioners.

There is a pressing need to clarify the Court's recent holding in *Will v. Michigan Department of State Police*, ___ U.S. ___ [109 S.Ct. 2304.] (1989). In *Will*, the Court held that damages are unavailable under 42 U.S.C. section 1983 against state officials who are sued only in their official capacity. However, imprecise language in the last sentence of the decision is causing both conflict and confusion.

Since *Will*, cases decided in the First[2], Second[3], Fourth[4], Seventh[5], Eighth[6], and Tenth[7] circuits, North

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[2] *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 567, fn. 10 (1st Cir. 1989) and *Jones v. Rhode Island*, 724 F.Supp. 25 (R.I. 1989).

[3] *Al-Jundi v. Estate of Nelson Rockefeller*, 885 F.2d 1060, 1066 (2nd Cir. 1989) ("As an initial matter we note that a section 1983 claim for damages against a state official can only be asserted against that official in his or her individual capacity."); *Santiago v. N.Y. Department of Corrections*, 725 S.Supp. 780 (S.D.N.Y. 1989); *Natural Foods, Inc. v. Rubin*, 727 F.Supp. 104, 107-108 (S.D.N.Y. 1989) ([*Will*] "does not appear to have altered the settled rule that a state official sued in his individual capacity may be held liable for damages.").

[4] *Smith v. Dodrill*, 718 F.Supp. 1293 (N.D. W.Va. 1989) and *Bellamy v. Borders*, 727 F.Supp. 247 (S.C. 1989).

[5] *Grosz v. Indiana*, 730 F.Supp. 1474 (S.D. Ind. 1990).

[6] *Nix v. Norman*, 879 F.2d 429, 433, fn.3 (8th Cir. 1989) ("[S]tate officials are liable for their conduct if sued in an individual capacity.")

[7] *Gray v. University of Kansas Medical Center*, 715 F.Supp. 1041 (Kan. 1989) and *Croft v. Harden*, 730 F.Supp. 342 (Kan. 1989).

Carolina[8], and Kentucky[9] have held that state officials continue to liable for damages under section 1983 when sued in their individual capacity. However, cases decided in the Sixth Circuit[10], Wyoming[11], and now California have held to the contrary.

Because of this conflict, the remedies available under section 1983 now vary from jurisdiction to jurisdiction. Had the present case arose in North Carolina, Kentucky, or the First, Second, Fourth, Seventh, Eighth or Tenth Circuit, petitioners would continue to have a remedy for damages against individual defendants under section 1983. Instead, according to the California Court of Appeal, petitioners have no action for damages under the same federal statute. By granting certiorari, this Court can quickly and definitively resolve this conflict and bring consistency and certainty to this important issue.

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[8] *Harwood v. Johnson*, 388 S.E.2d 139 (N.C. 1990) and *Corum v. University of North Carolina*, 389 S.E.2d 596 (N.C.App. 1990).

[9] *Board of Trustees v. Hayse*, 782 S.W.2d 609 (Ky. 1990).

[10] *Rice v. Ohio Department of Transportation*, 887 F.2d 716, 719 (6th Cir. 1989) ("The capacity in which the individual defendants were in fact acting is what matters, not the capacity in which they were sued.") But cf., *Wells v. Brown*, 891 F.2d 592 (6th Cir. 1989) ("We adopt the Eighth Circuit's interpretation of *Will*, which requires that plaintiffs seeking damages under section 1983 set forth clearly in their pleading that they are suing the state defendants in their individual capacity for damages, not simply in their capacity as state officials.") and *Kolb v. State of Ohio Dept. of Mental Ret. and Dev.*, 721 F.Supp. 885, 895 (N.D. Ohio 1989).

[11] *Buseck v. State*, 785 P.2d 855 (Wyo. 1990).

II. Respondents' analysis of 42 U.S.C. section 1981 is replete with red herrings.

Respondents make a number of spurious arguments concerning section 1981. Respondents contend that "Cases prior to *Jett* and after *Atascadero* made it clear that no damages remedy exists under section 1981." Respondents' Opposition at p. 13. All of the cases cited by respondents in support of this argument involve Eleventh Amendment immunity against damage suits filed in *federal* court. Notwithstanding respondents' confusion about the Eleventh Amendment, these cases have no bearing on the issue before this Court, since this action was brought in *state* court.[12]

Respondents also argue that "Plaintiffs are not entitled to relief because their action under section 1981 is not based upon the making and enforcement of contracts." Respondents' Opposition at p. 16. Respondents rely on *Patterson v. McClean Credit Union*, ___ U.S. ___ [109 S.Ct. 2363].

Respondents ignore the fact that *Patterson* involved a case of discrimination by a *private defendant* and the only right under section 1981 arguably impaired by the private defendant was the right to make and enforce contracts.

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[12] See, *Will v. Michigan Department of State Police*, ___ U.S. ___ [109 S.Ct. 2304, 2307] (1989) wherein the Court recently reiterated that "the Eleventh Amendment does not apply in state courts."

109 S.Ct. at 2372. In addition to the making and enforcement of contracts, section 1981 states that all persons shall have the right

> to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

These rights obviously are directed towards conduct by state agencies and other public entities and were not at issue in *Patterson*. Contrary to respondents' assertions, no court has held that section 1981 is restricted only to the making and enforcement of contracts.

III. Contrary to respondents' suggestions, this case involves important issues concerning the remedies available under the federal civil rights law.

In their opposition, respondents attempt to minimize the effect of their refusal to license Vietnamese physicians and the consequences of the lower court's decision. Respondents suggest that the case is unimportant because "the only licenses which were delayed were those for the four individual plaintiffs, and a few other similarly situated applicants." Respondents' Opposition at p. 21. Petitioners strongly disagree.

After reform legislation was enacted, over 30 fully qualified, Vietnamese applicants who had hitherto been denied their medical licenses became licensed physicians. However, the impact of respondents' refusal to license Vietnamese physicians extended far beyond these applicants. It affected dozens of family members, many of

whom were forced to undergo additional economic hardship during the years that the licenses were unjustly delayed. It also affected the Vietnamese refugee community in California. Because of respondents' actions, that community was denied skilled medical services from physicians who spoke the refugees' language, sympathized with their situation, and understood their culture.

Respondents also suggest that this case is unimportant because it involves an unpublished opinion. Whether reported or not, this case will have great significance in that the California Attorney General who represents respondents here will certainly look to it when advising state agencies and state officials concerning their potential liability for invidious discrimination. If the decision by the Court of appeal is allowed to stand, agencies in California and those who direct them, will be even less inclined to prevent, detect, and halt the type of discrimination which was aimed at petitioners here simply because they were Vietnamese.

In case after case, this Court has rejected the cynical notion that invidious discrimination against a small class of persons is of no concern and gross injustice is permissible in unpublished opinions. Contrary to respondents' suggestions, the State of California's exclusion of applicants from medical licensure because of their race or ethnicity and the remedies available to persons injured by such invidious discrimination is of the highest importance.

CONCLUSION

For the foregoing reasons, petitioners request that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

ROBERT FELLMETH
Center for Public Interest Law
University of San Diego
Alcala Park
San Diego, CA 92110
(619) 260-4806
Counsel of Record

CARL K. OSHIRO
JULIE D'ANGELO
Center for Public Interest Law
1160 Battery Street, Suite 340
San Francisco, CA 94111
(415) 544-8832
Counsel for Petitioners

September 24, 1990